COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 5

ALEXANDER L. GUTERMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on July 18, 1960.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit filed on July 18, 1960, has not as yet been reported, and is printed in Appendix B hereto, *infra*, pages 56-75. The opinion of the United States Court of Appeals for the Second Circuit in *United States* v. *Guterma* (Docket No. 25790), filed November 20, 1959, is reported at 272 F. 2d 344. The opinions of the District Court for the Southern District of New York have not been reported, except for an opinion reported at 24 F.R.D.

134. The other opinions of the District Court are reprinted at pages 42a-46a of petitioner Guterma's Appendix in the Court of Appeals, copies of which are appended to this petition. The opinions of the District Court for the Eastern District of New York are reported at 173 F. Supp. 218, 174 F. Supp. 581, 179 F. Supp. 417, and 181 F. Supp. 195. The decision of Mr. Justice Harlan denying bail pending appeal is reported at 80 S. Ct. 666, 4 L. Ed. 2d 735.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on July 18, 1960, and is printed herein in Appendix B hereto, *infra*, pages 76-77. The jurisdiction of this Court is invoked under 28 United States Code 1254(1).

Questions Presented

1. Whether petitioner has been afforded due process of law, and whether the proceedings in the District Court and the prosecutorial function so far departed from the accepted and usual course of judicial proceedings and from the requirements of procedural due process as to call for an exercise of this Court's power of supervision where:

(a) In a Federal criminal prosecution for failing to file reports required by the Securities Exchange Act, and conspiracy to violate the reporting provisions of that statute, the District Court denied a motion to strike from the conspiracy count a paragraph which set forth as a purpose of the conspiracy the non-federal crimes of misappropriation, conversion, embezzlement and theft;

(b) After the denial of such motion, the prosecution offered and the trial court received, over objection, such extensive proofs as to such state crimes as to lead the jury to believe that misappropriation, embezzlement, and

corporate looting was the offense for which petitioner was on trial, and the trial court, in its charge to the jury, emphasized and presented to the jury as the issues for their determination whether petitioner was engaged in a scheme to loot and siphon off the assets of F. L. Jacobs Co. and to manipulate and rig its stock, whether petitioner had engaged in fiduciary self-dealing, and in a scheme of fraud and deception, in such a manner that such evidence and such portions of the charge provided the basis for the conviction of petitioner;

(c) Members of the staff of the Securities and Exchange Commission issued press releases and statements, and supplied newspapers, magazines, and radio and television stations with hostile and prejudicial material relating to petitioner, including confidential government files, which thoroughly discredited the reputation of petitioner and made it impossible for him to obtain a fair trial by an impartial jury in the New York metropolitan area, and the District Court denied petitioner's motion pursuant to Rule 21-a of the Federal Rules of Criminal Procedure for a change of venue;

(d) The trial court received into evidence documents and records which the District Court had directed the prosecution to make available to petitioner for discovery and inspection prior to trial, and which the prosecution did not make available until offered in evidence during the trial;

(e) The District Court denied a motion for a bill of particulars necessary to enable petitioner to prepare adequately for trial;

(f) The prosecution offered and the trial court received into evidence, over objection, charts and reports purporting to summarize the evidence, but which did not conform to the evidence, which did not fully and accurately state the facts, and which were based upon conjecture and speculation;

(g) The trial court denied a motion for judgment of acquittal as to Count 1 of the indictment, although there was no credible evidence on which a conviction on such count could be supported;

(h) Where the trial court included in its charge to the jury a summary of the evidence which was one-sided and argumentative, emphasizing evidence adduced by the prosecution unfavorable to petitioner, and omitting evidence favorable to the defense.

2. Whether Section 16(a) of the Securities Exchange Act—15 U.S.C. § 78p(a)—and Rule X-16 of the Securities and Exchange Commission are so vague and indefinite that they fail to establish an ascertainable standard of guilt.

3. Whether the requirement of Section 16(a) of the Securities Exchange Act requiring reports from the beneficial owner of ten per cent of an equity security registered on a national securities exchange is to be construed, in determining the ten per cent factor, so as to include only the shares outstanding, or all shares authorized to be registered, including those reserved for the conversion of preferred stock and the exercise of options.

4. What the meaning of "beneficial ownership" is under Section 16(a) of the Securities Exchange Act.

5. Whether the penal provisions of Section 32(a)—15 U.S.C. § 78ff(a)—of the Securities Exchange Act making a willful violation of the statute or the rules or regulations thereunder an offense are rendered void and unconstitutional by the clause therein providing that "* * * but no person shall be imprisoned under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation".

6. Whether the District Court erred in denying petitioner's request for a ruling that, upon his taking the

stand in his own defense, the scope of cross examination by the prosecution would be limited so as to preclude examination into the subject-matter of three other unrelated and untried indictments in which petitioner was named as a defendant.

7. Whether petitioner could properly have been convicted as an aider and abettor under Counts 10 through 20 in the absence of a showing that he was aware that the making of Form 4 reports by Comficor was required.

8. Whether the allowable unit of prosecution under the Securities Exchange Act is a course of conduct or each individual act, and whether the sentence imposed by the trial court is violative of the policy of lenity prescribed by this Court.

Constitutional Provisions, Statutes, Rules and Regulations Involved

The constitutional provisions, statutes, rules and regulations involved are listed below, and are printed in Appendix A, *infra*, pages 45-54.

Constitutional Provisions

Constitution of the United States

Amendment 5
Amendment 6

Statutes

Securities Exchange Act of 1934

Title 15, United States Code, Section 78m
Title 15, United States Code, Section 78p(a)
Title 15, United States Code, Section 78c(11) and (12)
Title 15, United States Code, Section 78t(e)
Title 15, United States Code, Section 78ff(a)
Title 15, United States Code, Section 78gg

Criminal Code

Title 18, United States Code, Section 2

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General Rules and Regulations Under the Securities Exchange Act

Rule X-3B-1
Rule X-13A-1
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Rule X-16A-2
Rule X-16A-3

Federal Rules of Criminal Procedure

Rule 7(d)
Rule 7(f)
Rule 16
Rule 21(a)

Statement of the Case

Petitioner, together with three corporations and another individual defendant, Robert J. Eveleigh, was named as a defendant in an indictment handed down March 16, 1959, by a grand jury in the Southern District of New York. Twenty counts thereof charged violations of the reporting requirements of the Securities Exchange Act (Title 15, United States Code, Sections 78p(a), 78ff(a), and 78t(c). A twenty-first count charged violation of the conspiracy statute (Title 18, United States Code, Section 371).

This prosecution initially stemmed from injunctive proceedings instituted by the Securities and Exchange Commission in the Southern District of New York. Such proceedings sought, to the accompaniment of a massive barrage of publicity, a mandatory injunction against peti-

tioner requiring the filing of various reports under the Securities Exchange Act. (*Securities and Exchange Commission* v. *Guterma*, Southern District of New York, Civil Action No. 143-53.) The Government did not succeed in obtaining such an injunction, the District Court commenting that its charges were founded upon "merely conjecture, suspicion, speculation, innuendo or even inferences".

The Regional Administrator of the SEC in New York on February 13, 1959, initiated these criminal proceedings by filing a complaint with the United States Commissioner. The complaint charged that petitioner, while an officer and director of F. L. Jacobs Co., had sold shares of common stock of such corporation belonging to him, which stock was registered on the New York Stock Exchange, and had failed to file reports of such sales with the Commission and the Exchange. He obtained a warrant for petitioner's arrest, claiming that he had information (subsequently proven false) that defendant had arranged to flee to Turkey with half a million dollars in cash, in a suitcase. On learning of the issuance of such warrant, petitioner voluntarily surrendered to the District Court the same day.

On the filing of such complaint and the issuance of such warrant, the SEC Regional Administrator informed the press, and placed with various metropolitan newspapers background stories of a highly inflammatory nature concerning petitioner, pledging the press to secrecy until petitioner was "apprehended". Weeks prior to this, two SEC attorneys had been sent to the *New York Times* with bundles of confidential files which they were told to make available to the press concerning petitioner, despite the prohibitions contained in the law and in the Commission's own rules against disclosure of such confidential information.

Thus, the Sunday edition of the *New York Times* of February 14, 1958, contained an inflammatory article con-

cerning petitioner commencing on page 1, and running for more than an entire page in the news section, in which petitioner was described as a financial wizard and mystery man, with references to Serge Rubenstein, operators of gambling rings, and other persons accused of crime, none of whom bore any relation to any of the charges then or thereafter made against petitioner. Similar stories more lurid in their format and headlines appeared in other metropolitan newspapers, and in radio and television comment.

Such articles referred to petitioner in headlines as a "takeover artist", as one through whom the American public had lost many millions of dollars, and as one who had been anti-American and pro-Japanese in World War II. His office was described as a "cesspool".

Such articles improperly and prejudicially suggested that he was linked with "the madame of a call girl establishment, operators of Las Vegas gambling casinos, a prominent New York lawyer now a fugitive in South America from a SEC warrant in another securities case, an Armenian moneylender operating through a Swiss trust, a Greek financier with a Panamanian holding company, Swiss bankers, an ex-investment banker who was involved in a stock deal with Serge Rubenstein before the draft-dodging financial finagler was murdered, high pressure stock peddling boiler shops, New York money lenders who charge interest as high as 2 per cent a month—24 per cent a year, the president of a small bank now under indictment for buying without board authorization $495,000 in notes of the F. L. Jacobs Co., the top company of the Guterma industrial-radio-tv movie empire".

Such stories continued unabated, many of them containing direct quotations from SEC staff members characterizing and commenting upon petitioners in an unfavorable manner.

The effect of such publicity was such as to cause *Time Magazine* to comment that petitioner was completely ruined and discredited before any determination by the courts.

A prompt preliminary examination on such complaint, as provided for in Rule 5 of the Federal Rules of Criminal Rules, was demanded, but, on the opposition of the Government, was denied petitioner by the United States Commissioner and the District Court. Thereafter, the complaint was superseded by the indictment herein, which abandoned the charge made in the complaint that petitioner had sold Jacobs shares without reporting them.

Petitioner then moved, pursuant to Rule 21a of the Criminal Rules, for a change of venue to the Western District of New York on the ground that he could not obtain a fair and impartial trial before an uncontaminated jury in the metropolitan area. This motion was denied by the District Court, with leave to renew it at the time of trial. A sampling of such newspaper articles was filed with the District Court in connection with such motion.

Thereafter, the SEC caused additional indictments to be filed against petitioner. An indictment of twenty-six counts charging violations of the mail fraud statute and the Federal Reserve Act was filed against petitioner in the Eastern District of New York. An additional indictment, charging further violations of the Securities Exchange Act, was filed in the Southern District of New York. And an indictment charging violation of the Foreign Agents Registration Act was filed in the District of Columbia. Each was accompanied by a repetition of the damaging publicity which the Government actively created concerning petitioner.

Publicity of this character continued right to the time of trial, including a feature article entitled "The Spoilers — The World of Alexander L. Guterma" in a national magazine of large circulation, which, without restraint,

repeated all of the reckless statements earlier disseminated by SEC staff members, and sought to depict petitioner as a corporation wrecker and thief.

The motion for a change of venue was renewed at the trial, and again denied by the trial court. Although various veniremen admitted that they had read newspaper articles relating to petitioner and so could not render a fair and impartial verdict, the Court of Appeals held that the motion for a change of venue was properly denied. (Transcript, pp. 41, 48, 51, 52, 53-4, 75, 119-120.) The Court of Appeals, while of the view that petitioner's argument might have had validity if the trial had occurred in the spring of 1959, held that the publicity had abated by the actual time of trial. It expressed the view that petitioner's argument would be more plausible if the charges against him had been rape or murder rather than violation of reporting requirements "or even the looting of a company".

At the commencement of the trial, petitioner requested a ruling that, in the event that he should take the stand, the scope of cross examination be limited so that the Government might not question him as to the subject matter of the three other indictments in which he was a defendant, so as to protect him against affording the Government a pre-trial examination and discovery in those other prosecutions. The trial court ruled that it could properly give such a ruling, and might even require the prosecution to submit its questions in writing in advance. At the conclusion of the Government's case, however, the trial court refused to give such a ruling, and said that if petitioner took the stand, the prosecution would be limited in cross examination only by the narrow restrictions laid down in *United States* v. *Provoo*, 215 F. 2d 531 (2nd Cir., 1954), a decision which had been extensively broadened thereafter by the Court of Appeals in *Tomaiolo* v. *United States*, 249 F. 2d 683 (2nd Cir., 1957).

Because of the ruling of the trial court that, on taking the stand, petitioner would be subjected to cross examination as to the unrelated facts in the other three cases in which he had been indicted, he did not take the stand. Such cross examination, although apparently permissible under *Provoo*, would certainly not have been permissible under *Tomaiolo*. Yet, the Court of Appeals held there was no error in denying such a ruling to petitioner.

The charges in the indictment related to the alleged failure to file reports required to be filed with the Securities and Exchange Commission and the New York Stock Exchange in connection with F. L. Jacobs Co., a corporation whose common stock was listed on the New York Stock Exchange, and of which petitioners were officers and directors.

Counts 1 and 2 of the indictment charged that during the months of December, 1958, and January, 1959, respectively, there were changes in the beneficial ownership of petitioner in Jacobs common stock, that reports of such changes in beneficial ownership were required to be made to the Commission and the Exchange by petitioner within ten days after the close of the month in which such changes in beneficial ownership occurred, and that petitioner wilfully and knowingly failed to file such reports. Petitioner was convicted on both counts, the trial court denying a motion for judgment of acquittal thereon. The conviction on Count 2 was reversed by the Court of Appeals.

Counts 3 and 4 made identical charges against defendant Eveleigh with respect to the same months. At the close of the Government's case, Count 4 against Eveleigh was dismissed with the consent of the Government. He was convicted on Count 3.

Count 10 of the indictment charged that during the month of December, 1957, the corporate defendant Comfecor, Inc., became the beneficial owner of more than 10%

of the common stock of Jacobs registered on the New York Stock Exchange, and was accordingly required to file an initial report as to its beneficial ownership in Jacobs common stock with the Commission and the Exchange, and wilfully and knowingly failed to do so. Counts 11 through 20 each charge that in each of ten separate months subsequent to November, 1957, there were changes in the beneficial ownership of Comficor of the Jacobs stock owned by it, and that reports of such changes in beneficial ownership were required to be made to the Commission and to the Exchange, and that there was willful and knowing failure so to do. In each of Counts 10 through 20 petitioner is charged as an aider and abettor (Title 18, United States Code, Section 2), along with defendant Eveleigh, although the prosecution presented no proofs that petitioner was aware that such reports were required or did anything resulting in their non-filing. Petitioner was convicted on all such counts.

Whether Comficor was required to file such reports with the Commission and the Exchange depended upon whether at any time it was the beneficial owner of more than ten per cent of the common stock of F. L. Jacobs Co. registered on the New York Stock Exchange. The prosecution contended that the number of shares registered was identical with the number of shares outstanding, which were 882,607. Yet the Commission's own Rule X-3B-1 included in such a category all shares for which authority to add to the list has been granted, and the Exchange had notified petitioner that the number of shares whose listing was authorized was 1,190,036. Thus, depending upon which interpretation was applicable, a crucial variance of 30,743 shares affected the determination as to whether the 10% requirement was or was not applicable. In connection with these counts, petitioner raised the question of whether the penal provisions contained in Section 32(a), 15 U.S.C. 78ff of the act are not void for uncertainty.

Petitioner also raised in the District Court and in the Court of Appeals questions as to the constitutionality of the

provisions of the Securities Exchange Act upon which all of the substantive counts were based. Such provisions had never before been invoked or been the subject of decision in either a criminal or a civil case. The District Court, in the motion part, held that "it would be improvident to dispose of the grave issues raised on a motion to dismiss", and directed that the questions be postponed until the development of the trial record. Such motion was accordingly renewed at the end of the Government's case, and was then summarily denied without argument. Petitioner urges that Section 16(a) of the Securities Exchange Act, 15 U.S.C. 78p(2), and the SEC's regulations implementing it, are so vague and indefinite both as to what is required to be done, and as to the persons who are subject to it, as to fail to establish an ascertainable standard of guilt and to meet the certainty required of a criminal statute. The Court of Appeals summarily disposed of these questions, saying that they "bordered on the frivolous".

Count 5 charged that, during the period from August 1, 1957 through February 13, 1959, petitioner, while an officer, director and stockholder of Jacobs, wilfully, knowingly, and without just cause hindered, delayed and obstructed the making and filing with the Commission and the Exchange of the annual report of Jacobs for the fiscal year ending July 31, 1958, on Form 10-K which was required to be made and filed within 120 days after the close of the fiscal year by the Commission's Rule X-13A-1. Petitioner was convicted on such count.

Counts 6 through 9 each charged that petitioner, while an officer, director and stockholder of Jacobs, wilfully, knowingly and without just cause hindered, delayed and obstructed the making and filing with the Commission and the Exchange of current reports on Form 8-K for the calendar months of September, November, and December, 1958, and January, 1959, as required by the Commission's Rule X-13A-11, reflecting for each such month the disposition of a significant amount of assets of Jacobs otherwise

than in the ordinary course of business. The District Court dismissed Counts 6, 7, and 8, at the close of the Government's case. Petitioner was convicted on Count 9. The conviction on Count 9 was reversed by the Court of Appeals, which found that the Government had not established that such a report was required, and that there was no basis of a finding that the violation of the reporting requirement was knowing and willful. The Court of Appeals said "we therefore do not reach the question of whether the SEC's instructions are sufficiently intelligible to support a criminal conviction as a matter of due process".

Count 21 charged petitioner, defendant Eveleigh, the corporate defendants and four other individuals with conspiring to violate Sections 16, 20 and 32 of the Securities Exchange Act and to defraud the United States by impeding, impairing, obstructing and attempting to defeat the lawful functions of the SEC, by unlawfully, wilfully and knowingly failing to file individual Form 4 reports for the months of December 1958 and January 1959, and on behalf of Comficor for the eleven months above referred to, and by unlawfully, wilfully and knowingly, and without just cause, hindering, delaying and obstructing the making and filing by Jacobs of the annual report on Form 10-K for the fiscal year ending July 31, 1958, and the current reports on Form 8-K for the months of September, November, and December, 1958, and January, 1959.

In addition to charging a conspiracy to fail to file the specific reports covered by the twenty substantive counts of the indictment, there was included in the conspiracy count paragraph 7, which charged as a purpose of the conspiracy objectives which concededly were not and could not be violative of Federal Law. Paragraph 7 of the conspiracy count charged that:

> "7. It was further a part of said conspiracy that the defendants Alexander L. Guterma, Robert J. Eveleigh, F. L. Jacobs Co., Comficor, Inc., Chatham Corporation,

and co-conspirators Austin J. Hare, Salvatore R. Pavis, Garland L. Culpepper, Jr., and Seymour B. Lipton would transfer, assign, pledge, hypothecate, and otherwise encumber and subject to primary and contingent liabilities and cause to be transferred, assigned, pledged, hypothecated, and otherwise encumbered and subjected to primary and contingent liabilities, assets of F. L. Jacobs Co., for the purpose of making the assets and the credit of F. L. Jacobs Co. available for the use, benefit and unjust enrichment of defendants Alexander P. Guterma, Robert J. Eveleigh, Comficor, Inc., and Chatham Corporation."

Petitioner moved, pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure, to strike paragraph 7 from Count 21, but this motion was erroneously denied by the District Court to the great prejudice of petitioner. Petitioner was convicted on the conspiracy count, and that conviction was affirmed by the Court of Appeals.

By denial of petitioner's motion to strike there became available, and was utilized, a device of the character condemned in *Stirone* v. *United States*, 361 U. S. 212, whereby petitioner was prosecuted and convicted of offenses other than those with which he was charged. On the basis of the inclusion of such purposes as an objective of the conspiracy, the trial court admitted masses of evidence having no relationship to the charges of failure to file reports, or to the alleged conspiracy to violate the statutory provisions under which the substantive counts were laid. Through such device the whole emphasis of the trial was laid on corporate looting and manipulation, offenses as to which no charges had been made against petitioner, and as to which the judgment of conviction contains no reference. This so became the dominant aspect of the trial that the trial court instructed the jury in its charge:

> "Summarizing the alternatives, it is for you to decide whether Comficor was merely a nominee

for the convenience of persons who had faith in the future earning capacity of Jacobs and wanted to make a legitimate profit from an anticipated rise in the market price of the stock, or whether Comficor was a device to loot the Jacobs' assets and to manipulate the market price in Jacobs' stock; whether the letters of credit in the Classic Carpet transactions were just commercial transactions for the payment of goods, or were they circuitous devices to siphon off Jacobs' assets; whether Comficor existed and operated for sound business reasons or as a cloak for fiduciary self-dealing and manipulation of Jacobs stock; whether Comficor's purchases of Jacobs stock at high closing prices were just optimistic appraisals of the Jacobs company or a calculated scheme to boost the market price to enable Guterma and Eveleigh to sell their Jacobs stock at a profit through the route of pledges with money lenders; whether numerous brokerage houses were used to meet margin requirements or to hinder SEC investigation and detection of insider deals; whether the repeated pledging of substantial assets at high interest rates was to raise cash for valid business reasons or to siphon off Jacobs assets for the defendants' personal use or benefit; whether puppets were used as executives of Comficor just to comply with necessary corporate formalities or to effect fraud and deception; whether cash was removed from subsidiaries to the New York office for legitimate expansion of Jacobs business or as a step in a scheme to loot the assets; whether a Swiss bank was used for efficiency or secrecy; whether the records were kept from the assistant treasurer of the corporation because he was incompetent or because he was too efficient; whether the financial books were removed from Detroit to effect an economy or to play hide and seek with them away from the eyes of honest accountants; whether the statement by Guterma that

60,000 shares of Scranton stock were with the transfer agent and in the Jacobs office at the time when they were actually pledged with money lenders was an innocent lapse of memory or an outright lie." (Transcript, pp. 4964-66)

* * * * *

"It is for you to decide whether the defendants were picking up Jacobs stock at low option prices and unloading it at a higher price through the device of pledges to secure loans which they had no intention to repay, knowing that the stock would drop when the day of reckoning came, when the Stock Exchange demanded an annual report, and that then the money lenders would sell them out." (Transcript, p. 4962)

* * * * *

"* * * Another purpose of this requirement is to prevent manipulation of the stock market. In a free securities market, as in any other, prices respond to supply and demand in the form of the bid and asked quotation. Insiders could easily rig the market for their own benefit, at the expense of the outside public stockholders, if they can keep the price up by concealing buying in substantial volume, especially if they are selling with one hand and buying with the other, so that there is a wash sale with no money really changing hands." (Transcript, p. 4898)

The impact of these highly prejudicial statements by the Court (almost all of which were unrelated to the offenses charged in the indictment), coupled with the further instructions (Transcript, p. 4976):

"If you find that the law has been violated as charged, you should not hesitate because of sympathy, or for any other reason to render a verdict of guilty, as a clear warning to all that crimes such as charged here

> may not be committed with impunity. The American public is entitled to be assured of this."

was such that a jury, faced with determining the guilt of four defendants on seventeen counts of an indictment, after two months of trial, and, after an instruction from the Court that the jury was to return separate verdicts as to each defendant and as to each count (Transcript, p. 4973), could not and did not deliberate or pass upon each count and each defendant separately. Within two hours after it retired, the jury came in with a verdict of one word—"Guilty" (Transcript, p. 5002).

The Court of Appeals said "There is somewhat more in appellants' contention that so much of the trial was devoted to these transactions as to have created a hazard that the jury might be led into thinking that the looting of Jacobs was the substantive offense of which defendants were indicted". The Court of Appeals dismissed petitioner's objections to the quoted portions of the judge's charge because it construed some of such portions as being applicable only to the conspiracy count, although it conceded that "there is a certain unreality in supposing that the jury would remember these details from a charge taking nearly a hundred pages of the typewritten transcript".

Petitioner had moved, pursuant to Rules 7(f) and 16 of the Federal Rules of Criminal Procedure, for bills of particulars and discovery and inspection, for the purpose of preparing for trial. Petitioner sought to ascertain through such bills of particulars what the transactions were which the Government claimed resulted in changes of beneficial ownership of Jacobs stock, what transactions the Government claimed were significant dispositions of assets of Jacobs otherwise than in the ordinary course of business, and what the transactions were by which assets and credit of Jacobs were utilized for the use,

benefit, and unjust enrichment of the defendants. Absent such particulars, it was impossible for petitioner to prepare for trial, Jacobs being a company with gross revenues of millions of dollars a year.

The District Court initially denied petitioner's motion for a bill of particulars and discovery on the ground that the matters sought were "of an evidentiary nature." However, on reargument, discovery was granted in part. The orders of the District Court directed that the Government furnish petitioner with all records and documents relating to all dispositions of assets of Jacobs allegedly required to be reported on Form 8-K current reports for the four months specified in the indictment, and also to all instruments, papers, documents and records relating to the allegation that the assets and credit of Jacobs were transferred, assigned, pledged, hypothecated, or otherwise encumbered and subjected to primary and contingent liabilities for the use, benefit and unjust enrichment of the defendants.

The discovery order of the District Court was flouted and disobeyed by the Government. The Government did not make available the documents in its possession relating to such matters and transactions which it thereafter offered into evidence at the trial.

Despite the order of the District Court, the Government throughout the trial offered in evidence quantities of documents purporting to show diversion of assets of Jacobs for the alleged benefit of petitioner. Repeatedly, defense counsel unsuccessfully objected to the receipt of such evidence on the ground that there had been noncompliance with the discovery order. On only the first such occasion, did the trial court direct that the witness be withdrawn and returned later in the trial after the defense had had an opportunity to examine the proffered exhibits. In all other instances the only action taken by the trial court was to take a ten or fifteen minute recess

during which such documents might be examined by defense counsel in the court room, or to direct that defense counsel examine them during the luncheon recess. Such cursory examination could not and did not provide petitioner with the opportunity of readying a defense with respect to these specific transactions as to which no references had been made in the indictment. The prejudice to petitioner by the surprise injection of these matters into the trial is evidenced by the Government's emphasis upon them in its summation (Transcript, pp. 4714-22, 4772, 4811-24), and upon the trial court's emphasis upon them in the quoted portion of the charge.

The Court of Appeals dismissed petitioner's objections to the Government's failure to comply with the pre-trial order, merely saying "we find either that the documents in question were outside the scope of the order or that defendants were not prejudiced in view of the adjournments given by the trial judge and his clear indication of willingness to grant longer ones if these were requested".

The error in receiving such evidence was further compounded by the trial court permitting the Government to place in evidence, over strenuous objection, a series of admittedly grossly inaccurate charts and reports fabricated from speculation and conjecture and not from fact or evidence (Exhibits 21, 431, 432, 471, 472, 473, 474, 475, 476, 493, 494, and 495). The prejudice resulting from the admission into evidence of such charts is evidenced from the fact that they were the only exhibits requested by the jury in reaching its verdict. The Court of Appeals, in its opinion, did not pass upon or comment upon this point which was raised by petitioner at the trial and on appeal, despite the fact that such charts were clearly inadmissible under its own decision in *United States* v. *Altruda*, 224 F. 2d 935 (2nd Cir., 1955).

Petitioner's trial commenced on December 7, 1959, and concluded on January 27, 1960, when the jury, after two hours deliberation, returned a general verdict of "Guilty". The trial court immediately revoked bail and remanded petitioner. Subsequent applications for bail pending appeal were denied by the District Court, on the ground that petitioner having been born abroad, having resided in the Far East for many years, being an accomplished linguist, and having had extensive business dealings with foreign banks and companies, there was a sufficient likelihood of flight to justify the withholding of bail. The Court of Appeals and Mr. Justice Harlan, as Circuit Justice, on further applications for bail pending appeal, declined to disturb the denial of bail by the District Court on the ground that they could not say that there was not a basis for such a finding.

The trial court sentenced petitioner to two years on each of the fifteen substantive counts on which he was convicted, and to four years and eleven months on the conspiracy count, the sentences to be served concurrently, and imposed total fines of $160,000, consisting of $10,000 on each of the sixteen counts, petitioner to stand committed until the total fine is paid. With the reversal of the convictions on Counts 2 and 9, the fine was reduced to $140,000.

Reasons for Granting the Writ

Question 1. This case is the first criminal prosecution for violation of the reporting requirements of the Securities Exchange Act of 1934. It presents a record of such overzealous efforts to bring about a conviction and such an abuse of the prosecutorial function as to result in irregular and unfair procedures inconsistent with the requirements

laid down by this Court, and in a denial of justice and due process of law.

Petitioner was subjected to a massive attack, in the courts and in the press, by the Government. In the short space of a few months, petitioner was named as a defendant in four indictments, aggregating seventy-five counts, brought in three separate Districts. Petitioner's private papers and files were seized by the Government and impounded, and not made available to him until a few days prior to the commencement of the trial herein. *United States* v. *Gaterma*, 24 F.R.D. 134, reversed 272 F. 2d 344 (2nd Cir. 1959).

The publicity campaign to which petitioner was subjected was initiated and fed by the Securities and Exchange Commission. The contamination of public opinion resulting therefrom was such as to come within the statement of Mr. Justice Jackson in his concurring opinion in *Shepherd* v. *Florida*, 341 U. S. 50, 51, that "these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated".

The Court of Appeals acknowledged that the effect of this Government-inspired publicity was such that petitioner might not have had a fair trial if the trial had taken place in the spring of 1959, but concluded that the publicity had so abated by December of 1959 that the contention was no longer valid. But, as Mr. Justice Frankfurter said in his dissenting opinion in *Stroble* v. *California*, 343 U. S. 181, 201, "Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror • • •". See *The Right To An Impartial Jury*, 60 Col. L. Rev. 349-380. The distinction made by the Court of Appeals that there might be validity to this claim

of prejudice if the charge against petitioner were one of murder or rape, but not where he is charged with "the violation of requirements about which few jurors have ever heard or even the looting of a company relatively unknown" has no basis. And it indicates recognition even by the Court of Appeals that petitioner was convicted of corporate looting.

Inclusion in the count charging a conspiracy to violate the reporting requirements of the Securities Exchange Act of a paragraph charging as one of the purposes of the conspiracy state crimes of misappropriation, conversion, embezzlement, and theft, and the denial of a motion under Rule 7(d) of the Criminal Rules to strike such paragraph from the indictment, were contrary to the rule laid down by this Court that state crimes are not the proper subject of Federal indictment. *Parr* v. *United States*, 363 U. S. 370; *Ingram* v. *United States*, 360 U. S. 672, 683; *Ford* v. *United States*, 273 U. S. 593, 602.

The denial of such motion was likewise contrary to the decision of the Court of Appeals itself in *United States* v. *Abel*, 258 F. 2d 485 (2nd Cir., 1958), affd. 362 U. S. 217. In that prosecution for conspiracy to violate the espionage laws, the indictment contained an allegation that it was part of the conspiracy to engage in acts of sabotage. The Court of Appeals held the allegation as to sabotage was improperly included in the indictment, and that the defense motion to strike it should have been granted.

The Court of Appeals said that it did not reverse for this error only because the Government produced no proofs as to sabotage during the trial, and the trial court did not charge the jury as to sabotage, other than to instruct it that the indictment was not evidence and was not to be considered as evidence.

Contrast the situation in *Abel* with that here, where the compelling proofs related to uncharged looting and mani-

pulation, and the trial judge so emphasized them in his charge as to make them the dominant and controlling questions for the jury. By such ruling, the trial court opened the floodgates to receipt of hundreds of pages of testimony and voluminous exhibits, all irrelevant to the thrust of the indictment, highly inflammatory and prejudicial to petitioner, and yet so emphasized that they must have been the base upon which the jury rendered its verdict.

The gigantic pyramid of prejudice that flowed from this basic error so influenced the trial as to completely overshadow the legally framed charges in the indictment. That petitioner was being tried for alleged violations of the reporting requirements of the Securities Exchange Act and a conspiracy to violate such provisions was all but forgotten. The case assumed the character of a state court trial for larceny, and the elements of Federal jurisdiction became purely incidental. Applying this Court's test set forth in *Stirone* v. *United States*, 361 U. S. 212, 215-217, 219, petitioner asks: "Can this Court in good conscience say with certainty that such proofs, and such portion of the charge played no part in the verdict of the jury and that petitioner was convicted only on the evidence and instructions relating to the failure to file reports?" See also *United Pilots Assn.* v. *Halecki*, 358 U. S. 613, 619.

The Court of Appeals, while recognizing the hazard that so much of the trial was devoted to testimony concerning looting and manipulation "that the jury might be led into thinking that the looting of Jacobs was the substantive offense of which defendants were indicted", sought to soften the issues of looting and manipulation put by the trial judge to the jury by referring to his statement thereafter that "Considering these matters and others, which you no doubt have in your minds, you must determine if the conspiracy charge existed". But, to paraphrase the Court of Appeals, there is a certain unreality in supposing

that the jury would remember this detail from a charge taking nearly a hundred pages of the typewritten transcript, and in which the dramatically delivered passage, set out on pages 15, 16 and 17 hereof, was the nuclear charge. And references to manipulation and looting appeared elsewhere in the charge (Transcript, pp. 4898, 4962, 4976).

The receipt of evidence in support of these allegations of embezzlement, misappropriation, theft, and conversion, and the portions of the charge relating to them, were of such a character as to bring to bear the principle that "Conviction upon a charge not made would be a sheer denial of due process" as expressed time and again by this Court in *Parr* v. *United States*, *supra*, pp. 393-4; *Stirone* v. *United States*, *supra*; *De Jonge* v. *Oregon*, 299 U. S. 353, 362; *Cole* v. *Arkansas*, 333 U. S. 196, 200-1; *In re Oliver*, 333 U. S. 257, 273. The inclusion of the offending paragraph in the conspiracy count, the receipt of evidence in support of it, and the portions of the charge relating to them together constituted a device whereby petitioner could be and was convicted of an offense with which he were not charged. The Court of Appeals sought to justify the receipt of such evidence on the ground that "it was relevant for the Government to show that the conspiracy was motivated by a scheme to appropriate assets of Jacobs for defendants' benefit and to demonstrate what the facts were that defendants allegedly wished to conceal from the SEC and the public". That this was *not* the theory on which such evidence was received was made clear when the trial court refused the Government's request for an instruction that the jury might consider such evidence as proof of motive (Transcript, p. 4987). And in other cases the Court of Appeals has held it to be reversible error to receive such evidence. *United States* v. *Masino*, Docket No. 25419, decided February 18, 1960.

The prejudice of this was further compounded by the surprise and resulting inability to defend adequately

against such claims of embezzlement through the denial of petitioner's motion for a bill of particulars. To this was added persistent flouting and non-compliance by the Government with the District Court's order of discovery directing that petitioner be furnished before trial with the documents relating to all transactions through which the Government claimed that the assets and credit of F. L. Jacobs Co. were diverted for the use and unjust enrichment of petitioners. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *United States* v. *O'Connor*, 237 F. 2d 466, 475-6.

It was hardly a cure for the deficiency to expect counsel for four defendants to read and assimilate the contents of a single copy of voluminous documents thrown at them during a ten minute recess called for such purpose, and at the same time prepare their voir dire and cross examination. Forcing the defense to prepare cross examination as testimony was elicited from the lips of Government witnesses without any of the advance preparation to which petitioner was clearly entitled under the order of discovery was to transform the serious business of a criminal prosecution into a game of wits, with our system of justice as well as petitioners the loser.

And prejudice was further compounded by the receipt into evidence of Government-offered charts and reports concededly inaccurate, and based upon conjecture, speculation, and guesswork. This was a further abuse of discretion by the trial court, violative of the rule laid down by the Court of Appeals in *United States* v. *Altruda*, 224 F. 2d 935 (2d Cir., 1955). Although raised by petitioner in the Court of Appeals, as well as in the District Court, this point was not referred to by the Court of Appeals in its opinion. The significance of these charts, and their importance, is evidenced by the fact that they were the only exhibits which the jury requested during its deliberations. And of these thirteen chart-exhibits, all but one related solely to claimed diversions by petitioner of assets of Jacobs, and only one related to reporting requirements.

An example of such evidence is Exhibit 21, a "financial statement" of Jacobs as of July 31, 1958, prepared and released by remarkable coincidence at the commencement of the trial. This statement carried with it the statement by Ernst & Ernst, the accountants who prepared it, that they could not certify it because the contents were not substantiated, and reflected speculation, opinion, and guesswork. It was based upon hundreds of green ink and black ink entries made by one Locke long after petitioner had left Jacobs and which, by admittedly arbitrary guesses, wrote off millions of dollars of assets and set up unestablished liabilities, and adjustments. The inability of the accountants to certify its accuracy is understandable, the refusal of the trial court to exclude it from evidence is not.

Certainly in criminal prosecutions such statements are admissible only to the extent that they reflect correct entries, and the true condition of the corporate records, except to the extent that such records may have been prepared by the defendants. *Beck* v. *United States*, 33 F. 2d 107 (8th Cir., 1929); *United States* v. *Feinberg*, 140 F. 2d 592 (2d Cir., 1943), cert. den. 322 U. S. 726. It is no answer to say as did the Court of Appeals that "it was open to defendants to prepare counter-exhibits embodying their version of the evidence"—particularly when the prosecution's exhibits were withheld from them until the trial.

Such aspect of fairness as still remained in this trial was eliminated when the trial court purported to summarize the facts to the jury. Any summary must be fair and adequate, and not one-sided, *Williams* v. *United States*, 93 F. 2d 685 (9th Cir., 1938). In any summary, the judge must state the evidence fairly and accurately, both that which is favorable to the accused and that which is unfavorable. *Buford* v. *United States*, 185 F. 2d 171 (10th Cir., 1950). And, although he may dissect and analyze the evidence, the trial judge may never distort it. *United States*

v. *Stoehr*, 100 F. Supp. 143 (D. Pa., 1951), affd. 196 F. 2d 276, cert. den. 344 U. S. 826. Here the charge throughout emphasized and referred to unfavorable evidence adduced by the Government, and passed over and omitted evidence favorable to the petitioner. It reflected a virtual, though veiled, instruction to the jury to return a verdict of guilty as a matter of public duty.

The prejudicial character of the charge is indicated by the Court of Appeals' dismissal of the conviction on two counts specifically because of the portions of the charge relating to them. But the prejudice and unfairness of the charge were even greater as to the counts which were unreversed.

In sum, here was such a denial of due process of law, here was such an abuse of the prosecutorial function, that the conviction must be reversed, and the indictment dismissed. It is no answer to say, as did the Court of Appeals, that "if defendants choose to avail themselves of their constitutional right to a jury trial, they must take its frailties along with its strengths".

Questions 2 and 7. Petitioner stands convicted on twelve counts charging failure to file reports required by Section 16(a) of the Securities Exchange Act, 15 U.S.C. § 78p(2) and the Commission's Rule X-16. This is the first criminal prosecution to have been brought under these provisions. According to the Annual Report of the Commission for 1959, more than 39,000 persons come within the reporting requirements of these provisions. There is, accordingly, a large and important public interest in settling the constitutional questions and the questions of construction relating to these provisions which have been raised in this case.

Petitioner urges that the statutory provision and the Commission's rules are so vague and indefinite in their meaning as to fail to establish an ascertainable standard of guilt, and that, even though they may be valid as a dele-

gation of administrative power, they are invalid as a criminal statute. *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 243. Indeed, such a likelihood was anticipated by Congress when it provided in the separability provision of the Act that "If any provisions of this chapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the chapter and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby." Title 15, United States Code, Section 78gg.

The standards of certainty in criminal statutes must be so definite, both in regard to the persons subject to the Act and in regard to the applicable tests to ascertain guilt, that men of common intelligence are not required to guess at its meaning. *Winters* v. *New York*, 333 U. S. 507, 515-6; *United States* v. *Cardiff*, 344 U. S. 174, 176; *M. Kraus & Bros.* v. *United States*, 327 U. S. 614, 622; *People* v. *Caswell-Massey Co.*, 6 N. Y. 2d 497.

That the Commission's rules relating to the requirements of these reports are vague and difficult to understand, and require clarification, has been acknowledged by the Chairman of the Commission itself. *Hearings before Senate Committee on Banking and Currency, Stock Market Study*, 84th Congress, 1st Session, page 961.

Questions 3 and 4. Eleven of the twelve Form 4 counts on which petitioner was convicted have to do with the requirement that a beneficial owner of ten per cent or more of an equity security registered on a national securities exchange (other than an exempted security) must file reports as to any changes in such person's beneficial ownership. Such counts charge that the defendant Comficor, Inc., in each of eleven months, was required to file such reports, and failed to do so, petitioner being charged as an aider and abettor. The Government offered no proofs that petitioner was aware that such reports were required

or that he in any way assisted or brought about the alleged violations. The standards of proof established for a conviction as aiders and abettors in *United States* v. *Williams*, 341 U. S. 58, 64, and in *Turnipseed* v. *United States*, 272 F. 2d 106 (7th Cir., 1959), were not met.

Although Section 3 of the Act, 15 U.S.C. § 78c, defines most of the terms used in the Act, there is no definition of the terms "beneficial ownership" or "change in beneficial ownership" there or elsewhere in the statute, and such terms are not defined in any of the Commission's rules. The representative of the New York Stock Exchange who testified at the trial could not define these terms other than to say that they were to be distinguished from "record ownership" (Transcript, pp. 1104-6). And the trial court charged the jury that "the term 'beneficial ownership' means, in the context of this case, ownership as distinguished from mere record ownership" (Transcript, p. 4913). But neither the statute nor the rules so define it.

Whether or not Comficor was required to file such reports during the eleven months to which these counts relate depends on whether it was the beneficial owner of ten per cent or more of the Jacobs shares "registered" on the Exchange, the word "registered" being the term used in Section 16(a) of the Act, 15 U.S.C. § 78p(a). Section 12(b) of the Act, 15 U.S.C. § 78*l*, defines the manner in which shares become registered—providing that "a security may be registered on a national securities exchange by the issuer filing an application with the exchange".

The Commission, in implementing Section 16(a) with its Rule X-16A, has abandoned the requirements established by Congress and established new requirements of its own. Thus, Rule X-16A-1(a) provides that "None of the reports provided for in Section 16(a) need be made except as provided in this rule". Although Section 16(a) relates its requirements to securities *registered* on an exchange, the Commission, in Rule X-16A, has eliminated

reference to "registered" securities, in the reporting requirement, and relates the requirements instead to "listed" securities. This term nowhere appears in the Act. That "listed" and "registered" are two different terms with different meanings is apparent since the Rule then requires that reports as to "listed" securities must be filed with each exchange on which such equity securities are listed and registered. And the representative of the Stock Exchange testified that they had different meanings. (Transcript, pp. 3682-3, 3688-90, 3696-7, 3709, 3718, 3729-32.) This represents "a gross administrative usurpation of legislative power not to be tolerated". *Gross v. New York City Alcoholic Beverage Control Board*, 7 N. Y. 2d 531, 200 N.Y.S. 2d 12, 16 (1960).

The Commission has defined the term "listed" by its Rule X-3B-1 which provides that the term includes securities for which authority to add to the list on official notice has been granted. The plain meaning of this is that the shares become listed at the time that the exchange grants the authority for them to be listed.

The evidence at the trial was clear that such authority had been granted by the Stock Exchange for the listing of 1,190,036 shares of Jacobs common stock, including 332,607 shares reserved for the conversion of outstanding preferred shares and for the exercise of options, and that no further authority was required from the Exchange for the listing of any of such shares (Exhibit 490; Transcript, pp. 3729-31).

The prosecution contended that the term "listed" comprehended only those shares which were issued and outstanding as common shares, and none else, thus excluding from the base the crucial 332,607 shares authorized and reserved for the conversion of preferred and the exercise of options. Both the trial court and the Court of Appeals accepted the prosecution's contentions. Although the statute refers to beneficial ownership of ten per cent or

more of the registered shares, and nowheres refers to "issued shares", the Court of Appeals held that "in making issued shares the quantum to which the 10% test is to be applied, the SEC acted consistently with the language and purpose of Congress". And this despite the Court's recognition that many corporations had such unissued shares registered.

Petitioner's interpretation is reinforced by other sections of the Act. Section 12(a) makes it unlawful for any exchange member, broker or dealer to effect any transaction in any security on an exchange unless a registration is effective as to such security for such exchange. *Standard Fruit and S. S. Co.* v. *Midwest Stock Exchange*, 178 F. Supp. 669 (N. D. Ill., 1959). The Commission's own Rules X-12A-4 and 5 under such section permit trading in warrants, rights and options to purchase a security even though the shares to which they relate are still unissued. And Section 3(a)(11) of the Act defines the term "equity security" to include specifically "any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right". See also *Truncale* v. *Blumberg*, 80 F. Supp. 387 (SDNY, 1948), 88 F. Supp. 677 (SDNY, 1950), aff'd 182 F. 2d 1021 (2d Cir., 1950); *Park & Tilford, Inc.* v. *Schulte*, 160 F. 2d 984 (2nd Cir., 1947), cert. den. 332 U. S. 761.

Petitioner urges the correctness of his interpretation, as it is supported by the notice of authorization of the larger number of shares addressed to petitioner by the Exchange in the very month when the Government contends that the ten per cent mark had been reached, and a report was required (Exhibit 490). But, in any event, the conflicting requirements in the Act, in the rules of the Commission, in the Form 4 instruction sheets, and in the rules of the Exchange, are such that it cannot be said that "the elements of evasive conduct have been so clearly

expressed by the Commission that the ordinary citizen can know in advance how to avoid an unlawful course of conduct without being required to guess at the meaning of the requirement". *Winters* v. *New York*, *supra*; *M. Kraus & Bros.* v. *United States*, *supra*.

5. Each of the substantive counts of the indictment upon which petitioner was convicted is laid under Section 32(a) of the Securities Exchange Act, 15 U.S.C. § 78ff. Petitioner urges that this section is fatally defective and contravenes his constitutional guarantees under the Fifth Amendment.

The first clause of this section provides:

> "Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful, or the observance of which is required under the terms of this chapter * * * shall upon conviction be fined not more than $10,000, or imprisoned not more than two years * * *".

The next and last clause of this section then provides that:

> "* * * but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

A host of difficulties arises with any attempt to apply Section 32(a). To sustain the charge contained in the indictment, the prosecution must establish beyond a reasonable doubt that the defendants acted willfully. And the term "willfully", as used in the Securities Exchange Act comprehends knowledge on the part of the defendants. As to this, there can be little doubt.

During the House hearings on the Securities Exchange Act, the meaning of the term "wilful" as used in this

section was explored and probed by members of the House Committee in their examination of one of the draftsmen of the Act—Mr. Thomas G. Corcoran. Mr. Corcoran was specifically asked the question as to the meaning which the draftsmen intended to give to the term "wilfully" as used in this section, and he testified that it meant "willfully and knowingly" (House, Hearings, *Stock Exchange Regulation*, p. 1133). This, of course, was consistent with this Court's definition of the term in *United States* v. *Murdock*, 290 U. S. 389, 394-5, and in *United States* v. *Illinois Central Railroad Co.*, 303 U. S. 239, 243. In *United States* v. *Murdock*, *supra*, it was said:

> "The word often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act."

This is the same meaning which has been applied by the Commission itself in *Matter of Halsey, Stuart & Co.*, Securities Exchange Act Release No. 3410, where the Commission found that Halsey Stuart & Company's violation of the statute had not been willful because "the analysis of Halsey's obligation to deliver prospectuses has involved highly technical controversy over methods of tracing inventory through trading periods" despite the admitted facts that the firm was fully aware that it was not delivering prospectuses.

Indeed, each of the counts of the indictment expressly charges that the failure of petitioner to file the reports required occured "unlawfully, willfully, and knowingly". This, of course, was consistent with the interpretation given "willfully" by the draftsman of the Act, and by

the Commission in administering it, as well as with this Court's decision in *United States v. Murdock, supra*, also involving a reporting statute where it was said at page 396:

> "He whose conduct is defined as criminal is one who *willfully* fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be wilful to be criminal is persuasive that the same element is essential to the offense of failing to supply information." (Italics added.)

Here the element of knowledge was a crucial issue. As to the Form 4 counts, the meaning, or confusion as to the meaning, attributed by the Commission to "beneficial ownership" and what constituted ten per cent of the registered shares of Jacobs stock were the pivotal factors as to such counts. And, as to the four SK counts (all eventually dismissed) knowledge and understanding of the Commission's rules, and what they meant or were intended to mean, were the heart of the matter.

Yet the thrust of the final clause of Section 32(a) is to shift the burden of proof of this essential element of their own crimes upon petitioner, for it requires that he himself prove that he had no knowledge of such rule or regulation. Such a provision is in direct conflict with our basic concept that an accused needs not even assert a defense until the Government has established *all* of the elements of the offense with which he is charged. Since a conviction necessarily carries a finding

that the defendant had knowledge of the rules and regulations, no one convicted could claim the benefit of the last clause of Section 32(a) and thus obtain the protection which Congress intended to give him. And, indeed, in the twenty-six years of the Act's life, no one has been able to claim such protection.

The defects of this provision are strikingly illustrated and compounded by the circumstances here. Presenting no proof of willfulness, the Government seemingly rested on a presumption of willfulness not available otherwise than through this penal section, which requires a defendant to take the stand in order to disprove the element of willfulness and thus avoid imprisonment and, apparently, conviction. Here the trial court rejected petitioner's offer to take the stand unless his right not to incriminate himself under the other three indictments then pending were protected. Under such ruling, taking the stand to disprove the element of willfulness would have thus exposed petitioner to a searching examination concerning the facts of such other pending indictments and would have further infringed upon his constitutional right against self-incrimination.

The importance of a ruling by this Court as to this question is evidenced by the fact that, as stated in the Commission's 1959 annual report, during such year alone 44 persons were indicted under the Act.

6. The District Court denied petitioner's request for a ruling that, on his taking the stand, the scope of cross examination would be limited so as to preclude examination into the unrelated subject matter of the other three indictments then pending against him. This refusal was such an abuse of the prosecutorial function as requires this Court to exercise its supervisory powers over the conduct of Federal criminal trials.

When such application was made, the prosecution protested that no authority for such a ruling existed. The trial judge then said:

> "Ordinarily that would be true except in this area here the practice is sometimes to rule on the issue even to the point of making the prosecution state its questions in writing ahead of time". (Transcript, pp. 1258-60).

Nevertheless, at the conclusion of the prosecution's case, the trial court said:

> "Well, I don't think that I am required to make any ruling at this time other than to tell you, and to remind government counsel, that the scope of cross examination must stay within the bounds of the *Provoo* rule and beyond that I cannot rule." (Transcript, pp. 4117-4120.)

In circuits other than the Second Circuit, it has been the rule that when a defendant takes the stand in a criminal case, he may not be impeached on cross examination except by proof of conviction of a crime, and that acts of misconduct not resulting in such a conviction are not properly subjects of cross examination. As stated in *Edwards* v. *United States*, 18 F. 2d 402 (8th Cir., 1927), the rule is:

> "Nothing short of conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted for the reason that innocent men are often arrested charged in a criminal offense. * * * The authorities heretofore cited are conclusive that no witness can, on cross-examination, be asked questions of this nature nor is such evidence, even if sought to be established by other witnesses, admissible against the defendant".

This is the rule followed generally in other circuits. See *Banning* v. *United States*, 130 F. 2d 330 (6th Cir.,

1942); *Stansbury* v. *United States*, 219 F. 2d 165 (5th Cir., 1955); *Manley* v. *United States*, 238 F. 2d 221 (6th Cir., 1956); *Little* v. *United States*, 93 F. 2d 401 (8th Cir., 1937); *United States* v. *Nettl*, 121 F. 2d 927 (3rd Cir., 1941); *Johnson* v. *United States*, 318 U. S. 189.

Only the Second Circuit has departed from this rule, the Court of Appeals there having permitted the cross-examination of defendants who have taken the stand as to misdemeanors, disbarments, and even criminal acts which were not established by a judgment of conviction. *United States* v. *Schiller*, 187 F. 2d 372; *United States* v. *Gruber*, 123 F. 2d 307; *United States* v. *Buckner*, 108 F. 2d 921; *United States* v. *Frankel*, 65 F. 2d 285. See *Provoo* v. *United States*, 215 F. 2d 531 (2d Cir., 1954).

In *Provoo*, the defendant, charged with treason, took the stand in his own defense. The prosecution on cross-examination directed questions to him designed to show that he had been charged with being a homosexual. Because of this, the judgment of conviction was reversed.

In the *Provoo* decision, however, the Court of Appeals did not repudiate the separate rule of the Second Circuit, nor did it state that the rule followed by other Circuits would now be applied there. It confined itself to the narrow area of the questions as to homosexuality, holding that they were so inflammatory and prejudicial, as well as so obviously irrelevant to the question of whether the defendant had committed treason, that it reversed the conviction.

That the only questions which would be barred under the *Provoo* rule were those relating to homosexuality was evident from the prosecutor's statement, immediately on the trial court's ruling, that "the Government is not going to try to prove that Guterma is a homosexual". (Transcript pp. 4117-4120.)

Obviously therefore the ruling of the trial court placed petitioner in a very difficult dilemma. Petitioner desired

to testify fully with respect to the charges for which he was on trial. However, he faced the risk that if he did so he might be cross examined extensively as to other charges pending against him in the Federal courts which had not yet gone beyond the stage of indictment. He might thus be forced to furnish the Government with testimony which it might thereafter use to incriminate him in those other and separate cases. Moreover, answering a single question, he might lose his privilege of self-incrimination not only as to the charges for which he was on trial, but as to these other charges as well. *Rogers* v. *United States*, 340 U. S. 367, 378. He would be affording the Government full discovery as to those other charges.

To put petitioner to this risk if he took the stand in his own defense vitiated his constitutional guarantees against self-incrimination, and relegated the Fifth Amendment's privilege to a second-rate position. *Rogers* v. *United States*, *supra*, page 378. The denial of petitioner's application for a ruling was in conflict with the concept voiced in *Boyd* v. *United States*, 116 U. S. 616, 632, that the Fifth Amendment must be construed broadly, for to compel a person to convict himself of a crime is "contrary to the principles of a free government" and "abhorrent to the instincts of an American". It was an abuse of discretion and an infringement of petitioner's constitutional guarantees under the Fifth Amendment to refuse to rule that on cross examination the Government might not inquire as to the facts relating to such other indictments.

The Court of Appeals found no error in the refusal of such a ruling, merely saying "We are not aware of any requirement for such a ruling".

8. The imposition on petitioner of cumulative fines on each substantive count of the indictment is directly con-

trary to the policy of lenity laid down by this Court in *United States* v. *Universal C.I.T. Credit Corporation*, 344 U. S. 218; *Bell* v. *United States*, 349 U. S. 81, and in *Ladner* v. *United States*, 358 U. S. 169, and previously adhered to by the District Court in *United States* v. *Personal Finance Company*, 174 F. Supp. 871. (SDNY, 1959).

Petitioner here was convicted on fifteen substantive counts, each charging violation of the Securities Exchange Act of 1934. Thirteen of such counts (the conviction on one of which was reversed on appeal) charged that petitioner had failed to file Form 4 reports called for under the Act. Two of such counts (the conviction on one of which was reversed on appeal) charged that petitioner had obstructed, hindered and delayed F. L. Jacobs Co. from making and filing reports required of it under the Act. The District Court imposed a maximum sentence of $10,000 on each of the fifteen substantive counts, and an additional fine of $10,000 on the conspiracy count, making a total fine of $160,000 imposed on petitioner. The reversal of the conviction on the two counts as noted, reduced the fine to $140,000. The trial judge directed that "the defendant is to stand committed until the fines are paid or he is otherwise discharged according to law".

In the *C.I.T.* case, *supra*, the indictment consisted of thirty-two counts, each count charging defendants with a separate offense for each alleged separate breach of the Fair Labor Standards Act. This Court held that the allowable unit of prosecution under that Act was a course of conduct, and that the Act was not to be read so as to enable the prosecutor to treat as a separate offense each breach of the obligations imposed thereby. In its opinion, the Court said:

> "When choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken language that is

clear and definite. We should not derive criminal outlawry from some ambiguous implication."

* * * * * *

"The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose, or action which may be deemed a single 'impulse', a conception recognized by this Court in the *Blockburger* case, *supra*, at 302 * * * Cf. *Blockburger* v. *United States*, 284 U. S. 299."

The Congressional wording of the Fair Labor Standards Act, which this Court found called for application of the policy of lenity, is identical with that of the Securities Exchange Act. It was therefore complete error for the courts below to have refused to apply the same policy.

The penal provision of the Fair Labor Standards Act provided "a maximum fine of $10,000 for any person who willfully violates any of the provisions of Section 15, 29 U.S.C. 215. Section 15 makes it unlawful for any person . . . (2) to violate any of the provisions of Section 6 or Section 7 . . . (5) to violate any of the provisions of Section 11(c) . . ." *United States* v. *Universal C.I.T. Credit Corporation*, *supra*, page 219, footnote 1.

The penal provision of the Securities Exchange Act, contained in Section 32(a) of the Act, 15 U.S.C. § 78ff. is couched in identical language. It provides that:

"Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, * * * shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both * * *".

In other respects, the enforcement provisions of the two Acts are similar. Thus, in the *C.I.T.* case, *supra*, this Court pointed out at page 222 that:

> "The penal provision of the Fair Labor Standards Act is only part of a scheme available to the Government and to the employee for enforcing the Act. The preventive remedy of an injunction and individual or class suits for restitution and damages in §16(b) are not only also available. They are the remidies more frequently invoked and more effective in achieving the purposes of the Act."

This is identical to the situation under the Securities Exchange Act. Such Act provides for injunctive remedies, and for individual and class suits for civil damages, all of which are frequently invoked. Moreover that the penal provisions of the Exchange Act, as under the Fair Labor Standards Act, are only a minor part of the enforcement machinery is shown by the fact that in the twenty-six years since the Act became law, the present case was the first criminal prosecution for violation of these sections of the Act.

More recently, in *Bell v. United States*, 349 U. S. 81, this Court reasserted the rule stated in the *C.I.T.* case, *supra*:

> "When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining of what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may be fairly said to be a pre-

sumption of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

The legislative history of the Securities Exchange Act discloses nothing to indicate a Congressional purpose of making "each stick in the faggot" a separate offense subject to a separate and cumulative sentence. To the contrary, the legislative reports and hearings all indicate a broad approach to the elimination of the courses of conduct which had been exposed by the Senate Committee on Banking and Currency.

Here there have been imposed on petitioner separate and cumulative fines on twelve counts, each of which charged a failure on his part to file Form 4 reports. However, the theory of the prosecution was that the failure to file all of these reports stemmed from a single impulse of thought and purpose, as described in *Blockburger* v. *United States*, 284 U. S. 299. This is evident from the conspiracy count in the indictment which alleged that the defendants and the other conspirators entered into a single agreement not to file the specific reports to which the substantive counts of the indictment related. See count 21, paragraphs 1, 9, 10, 11, and 12.

Ignoring the decisions of this Court in *Universal C.I.T. Credit Corp.* v. *United States*, *supra*; *Bell* v. *United States*, *supra*, and *Ladner* v. *United States*, *supra*, and relying upon decisions of this Court prior to *C.I.T.*, the Court of Appeals rejected petitioner's contention, saying: "To hold that each willful default in filing a monthly report is a separate offense is consistent both with the language of the statute and with the important purpose of achieving the timely filing of current information which Congress considered necessary for the protection of investors". Yet the language of the statute is identical with that in the Fair Labor Standards Act which the Court

in *C.I.T., supra*, held made a course of conduct the unit of prosecution. And the deterrent effect of cumulative punishment is a factor not to be considered where Congress has not specifically provided for cumulative punishment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Richard H. Wels,
Counsel for Petitioner.

New York, N. Y.,
August 12, 1960

APPENDIX A

Constitutional Provisions, Statutes, Rules and Regulations Involved

Constitutional Provisions

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes

Title 15, United States Code, Section 78m

(Section 13 of the Securities Exchange Act of 1934)

(a) Every issuer of a security registered on a national securities exchange shall file the information, documents, and reports below specified with the exchange (and shall

file with the Commission such duplicate originals thereof as the Commission may require), in accordance with such rules and regulations as the Commission may prescribe, as necessary or appropriate for the protection of investors and to insure fair dealing in the security—

(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to section 78*l* of this title;

(2) Such annual reports, certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports, as the Commission may prescribe.

(b) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earning statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination or depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter, and, in the case of carriers subject to the pro-

visions of section 20 of Title 49, or carriers, required pursuant to any other Act of Congress to make reports of the same general character as those required under such section 20, shall permit such carriers to file with the Commission and the exchange duplicate copies of the reports and other documents filed with the Interstate Commerce Commission, or with the governmental authority administering such other Act of Congress, in lieu of the reports, information and documents required under this section and 78*l* of this title in respect of the same subject matter.

(c) If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

Title 15, United States Code, Section 78p(a)

Section 16(a), Securities Exchange Act of 1934

(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate origi-

nal thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

Title 15, United States Code, Section 78c(11) and (12)

Sections 3(a)(11) and (12), Securities Exchange Act of 1934

(a) When used in this chapter, unless the context otherwise requires—* * *

(11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12) The term "exempted security" or "exempted securities" shall include securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States; such securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as shall be designated for exemption by the Secretary of the Treasury as necessary or appropriate in the public interest or for the protection of investors; securities which are direct obligations of or obligations guaranteed as to principal or interest by a State or any political subdivision thereof or any agency or instrumentality of a State or any political subdivision thereof or any municipal corporate instrumentality of one or more states; and such other securities (which may in

clude, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an "exempted security" or to "exempted securities".

Title 15, Section 78t(c), United States Code

Section 20(c) of the Securities Exchange Act of 1934

(c) It shall be unlawful for any director or officer of, or any owner of any of the securities issued by, any issuer of any security registered on a national securities exchange, without just cause to hinder, delay, or obstruct the making or filing of any document, report, or information, required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title.

Title 15, United States Code, Section 78ff(a)

Section 32(a), Securities Exchange Act of 1934

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon

conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such a person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Title 15, United States Code, Section 78gg

Section 33, Securities Exchange Act of 1934

If any provision of this chapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the chapter and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

Title 18, United States Code, Section 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Rules

General Rules and Regulations Under the Securities Exchange Act of 1934

Rule X-3B-1. Definition of "Listed".

The term "listed" means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in dis-

tributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

Rule X-13 A-1. Requirement of Annual Reports.

Every issuer having securities listed and registered on a national securities exchange shall file an annual report for each fiscal year after the last fiscal year for which financial statements were filed in its application for registration. Registrants on Form S-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate form.

Rule X-16 A-1. Reports Under Section 16(a).

(*a*) None of the reports provided for in section 16(*a*) need be made except as provided in this rule.

(*b*) RULE FOR THE USE OF FORM 4.—Every person who at any time during any month has been directly or indirectly the beneficial owner of more than 10 per cent of any class of any equity security (other than an exempted security) which is listed on a national securities exchange, or a director or an officer of the issuer of such security, shall, if there has been any change during such month in this ownership of any equity security of such issuer, whether registered or not, file with each exchange on which any equity security of the issuer is listed and registered a statement on Form 4 (and a single duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes

in his ownership as have occurred during such calender month. Such statements must be received by the Commission and the exchange on or before the tenth day of the month following that which they cover.

* * * * * *

(*d*) RULE FOR THE USE OF FORM 6.—Every person who becomes directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security), which is listed on a national securities exchange, or becomes a director or an officer of the issuer of such security, shall file with each exchange on which any equity security of the issuer is listed and registered a statement on Form 6 (and a single duplicate original thereof with the Commission) of the amount of all equity securities of such issuer, whether registered or not, so beneficially owned by him immediately after becoming such beneficial owner, director, or officer. Such statement must be received by the Commission and the exchange on or before the tenth day following the day on which such person became such beneficial owner, director, or officer. Such person need not file the statement required by this paragraph, if prior to such tenth day and during the calendar month in which he has become such beneficial owner, director, or officer, there has been a change in his beneficial ownership which will require him to file a statement pursuant to paragraph (*b*) of this rule with respect to the same securities.

Appendix A.

Rule 16a-2. *Ownership of More Than 10 Percent of an Equity Security.*

In determining, for the purpose of Rule 15a-1, whether a person is the beneficial owner, directly or indirectly, of more than 10 percent of any class of any listed equity security, such class shall be deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer; except that for the purpose of determining the percentage of ownership of voting trust certificates or certificates of deposit for equity securities, the class of voting trust certificates or certificates of deposit shall be deemed to consist of the entire amount of voting trust certificates or certificates of deposit issuable in respect of the class of equity securities which may be deposited under the voting trust agreement or deposit agreement in question, whether or not all of such class has been so deposited.

Rule X-16A-3(c). *Manner of Reporting Holdings and Changes in Ownership Under Rule X-16A-1.*

(c) Reports filed pursuant to Rule X-16A-1 may contain any relevant explanatory matter.

Federal Rules of Criminal Procedure

Rule 7(d). Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

Appendix A.

Rule 7(f). Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice may require.

Rule 16. Discovery and Inspection.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents, or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 21. Transfer from the District or Division for Trial.

(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

APPENDIX B

Opinion and Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 362—October Term, 1959.

(Argued June 7, 1960 Decided July 18, 1960.)

Docket No. 26198

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALEXANDER L. GUTERMA and ROBERT J. EVELEIGH,

Defendants-Appellants,

—and—

F. L. JACOBS CO., COMFICOR, INC., and CHATHAM CORPORATION,

Defendants.

Before:

LUMBARD, *Chief Judge*, and CLARK and FRIENDLY, *Circuit Judges*.

Defendants Guterma and Eveleigh appeal from a judgment of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, convicting them, after a jury trial, of offenses under § 32 of the Securities Exchange Act of 1934 and of conspiracy under 18 U. S. C. § 371. The judgment is affirmed except for the conviction of Guterma on Count 2 which is reversed, and of both

appellants on Count 9 which is reversed with directions to dismiss.

JEROME J. LONDIN, Exec. Ass't U. S. Att'y, David P. Bicks, Ass't U. S. Att'y (Morton S. Robson, Chief Ass't U. S. Att'y and George I. Gordon, Ass't U. S. Att'y on the brief), *for Appellee.*

RICHARD H. WELS (James L. Adler, Jr., Gabriel Galef and Moss, Wels & Marcus on the brief), New York, New York, *for Defendant-Appellant Guterma.*

EMANUEL ESCHWEGE, New York, New York, *for Defendant-Appellant Eveleigh.*

FRIENDLY, *Circuit Judge:*

Alexander L. Guterma and Robert J. Eveleigh appeal from a judgment of the District Court for the Southern District of New York which convicted them, after a jury trial, of various offenses under §32 of the Securities Exchange Act of 1934 and of conspiracy, under 18 U. S. C. §371, to violate the Securities Exchange Act and to defraud the United States by impeding and attempting to defeat the lawful functions of the Securities and Exchange Commission, all with reference to F. L. Jacobs Co., a company whose common stock was registered with the SEC under the Securities Exchange Act and listed on the New York Stock Exchange. Appellants were indicted along with Jacobs, which first pleaded guilty and later *nolo contendere*, and Comficor, Inc. and Chatham Corporation, alleged to be personal holding companies of Guterma, which were convicted on certain counts but have not appealed. The trial took all or part of 34 days. We have concluded that the judgment convicting Guterma and Eveleigh should

be affirmed with two exceptions: Guterma's conviction on Count 2 relating to his failure to file an "insider's report" (Form 4) for January, 1959, and the conviction of both appellants on Count 9 relating to their alleged willful hindering of the filing of a current report (Form 8-K) of Jacobs for January, 1959.

The indictment, which was in 21 counts, related to various matters concerning Jacobs, whose business had been that of a subcontractor for automotive parts. In March, 1956, Guterma acquired 20,000 Jacobs shares of a total of 875,622 and became chairman of the board of directors; in the following years he acquired large additional amounts of stock and received stock options. Eveleigh became vice president, treasurer and a director of Jacobs; he also owned stock and held stock options in Jacobs and assisted Guterma in the operation of Comficor and Chatham Corporation. During 1958, under Guterma's direction, Jacobs acquired all or a controlling interest in a number of other companies. On December 4, 1958, the New York Stock Exchange suspended trading in the stock of Jacobs because of the company's failure to file its annual report for the fiscal year ended July 31, 1958, on October 31, 1958 as required.

The indictment, found on March 16, 1959, contained 21 counts. These can be divided into three categories:

(a) Counts 1-4 and 10-20 charged willful violations of the requirements of §16(a) of the Securities Exchange Act for the filing of so-called insider reports, (Form 4) by officers, directors or beneficial owners of more than 10% of any class of an equity security registered on a national securities exchange within 10 days after the close of any month in which any change in such ownership occurs. Counts 1 and 2 charged failures by Guterma to file reports allegedly required of him as an officer and director of Jacobs for December, 1958, and January, 1959; Counts 3

and 4 charged similar failures by Eveleigh for the same months. Counts 10-20 charged the failure of Comficor, Guterma and Eveleigh to file reports allegedly required from Comficor as a 10% beneficial owner of Jacobs' stock for each month from December, 1957, through July, 1958, and from November, 1958, through January, 1959. Count 4 against Eveleigh was dismissed during the trial with the government's consent.

(b) Counts 5-9 charged violation of the corporate reporting requirements of §13(a) of the Securities Exchange Act. Count 5 charged that Guterma and Eveleigh willfully, knowingly and without just cause hindered, delayed and obstructed the making and filing of Jacobs' annual report (Form 10-K) for the fiscal year ending July 31, 1958, which §13(a) of the Act and SEC Rule X-13A-1 required to be filed with the SEC within 120 days after the close of the fiscal year. Counts 6, 7, 8 and 9 charged that Guterma and Eveleigh willfully, knowingly and without just cause hindered, delayed and obstructed the making and filing of current reports (Form 8-K) which §13(a)(1) of the Act and SEC Rule X-13A-11 allegedly required of Jacobs for September, November and December, 1958 and January, 1959, because of its disposition of a significant amount of assets in each such month. The Court dismissed Counts 6, 7 and 8 for lack of proof of dispositions during the respective months of assets sufficient to require an 8-K report, rejecting the government's contention that transactions in various months could be cumulated to meet the quantitative test in the SEC instructions which we shall discuss below in connection with Count 9.

(c) Count 21 charged all five defendants with conspiring with each other and four other individuals to violate §§ 16, 20 and 32 of the Securities Exchange Act and to "defraud the United States by impeding, impairing, obstructing and attempting to defeat the lawful functions of

an agency of the United States of America, namely, the Securities and Exchange Commission, in the protection of the investing public," by failing to file or obstructing and delaying the filing of the reports previously referred to and by filing reports of Jacobs "which were false and misleading with respect to material facts and which contained omissions of material facts."

The jury found all defendants guilty on all the counts that had been submitted to it. The judge sentenced Guterma to two years on each of Counts 1, 2, 5 and 9, to one year on each of Counts 10 through 20, and to four years and eleven months on the conspiracy count, the sentences to be served concurrently, and imposed fines of $10,000 on each of the 16 counts. He sentenced Eveleigh to one year on each of Counts 3, 5, 9 and 10 through 20, and to two years and eleven months on the conspiracy count, the sentences to be served concurrently, and imposed a $10,000 fine on the conspiracy count.

(1) A major contention of appellants relates to the denial of their motion to strike paragraph 7 of the conspiracy count which we set forth in the margin,[1] to the admission of evidence under that paragraph, and to the judge's charge concerning it. The motion to strike was correctly denied. The government had charged a conspiracy not to file re-

[1] "7. It was further a part of said conspiracy that the defendants Alexander L. Guterma, Robert J. Eveleigh, F. L. Jacobs Co., Comficor, Inc., Chatham Corporation, and co-conspirators Austin J. Hare, Salvatore R. Pavis, Garland L. Culpepper, Jr., and Seymour B. Lipton would transfer, assign, pledge, hypothecate, and otherwise encumber and suoject to primary and contingent liabilities and cause to be transferred, assigned, pledged, hypothecated, and otherwise encumbered and subjected to primary and contingent liabilities, assets of F. L. Jacobs Co., for the purpose of making the assets and the credit of F. L. Jacobs Co. available for the use, benefit and unjust enrichment of defendants Alexander L. Guterma, Robert J. Eveleigh, Comficor, Inc., and Chatham Corporation."

quired reports and to defraud the government of the lawful functioning of the SEC for the protection of investors by such failure and by the filing of false and misleading reports, see *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924); it was relevant for the government to show that the conspiracy was motivated by a scheme to appropriate assets of Jacobs for defendants' benefit and to demonstrate what the facts were that defendants allegedly wished to conceal from the SEC and the public. There is somewhat more in appellants' contention that so much of the trial was devoted to these transactions as to have created a hazard that the jury might be led into thinking that the looting of Jacobs was the substantive offense of which defendants were indicted; although the judge's charge analyzed the evidence on each substantive count, appellants contend that what might otherwise have been the helpful effect of this was nullified by a passage, near the end of the charge, in which the judge dwelt at length on the transactions as to which the government had offered proof under paragraph 7 of the conspiracy count. Indeed, appellants claim this passage enhanced the risk that the jury would convict on all counts for the acts proved under paragraph 7. However, the judge made the bearing of this evidence clear by adding, immediately after the criticized passage, "Considering these matters and others, which you no doubt have in your minds, you must determine if the conspiracy charged existed"; and the only criticism of this portion of the charge made at the time was met in a manner stated to be satisfactory by counsel for Comficor who was the only one to take exception. Moreover, whatever the situation might be in a trial presenting a close issue of fact, the government's case on the conspiracy count and on Count 5, relating to obstructing the filing of the 10-K report, was overwhelmingly established; we are reversing the conviction on Count 9 relating to the failure to file the Form 8-K report for January, 1959; and we see

no basis for belief that the jury did not decide the entirely different issues with respect to the failure to file insider reports on the evidence pertinent to those counts alone.

(2) Another general claim of appellants is that the statutory and regulatory scheme on which the substantive counts are based is so vague and indefinite as to contravene the Fifth and Sixth Amendments when invoked in a criminal prosecution. There is nothing vague or indefinite in the requirement for filing an annual report, and we do not reach the constitutional question with respect to the requirement for filing current reports in view of our reversal of the conviction of this count on another ground. Thus there remain only the attacks on § 16(a) relating to insider reports. These seem to reduce themselves to two. One relates to the phrase requiring a report of "any change in such ownership during such month"; this is asserted to be too vague, at least as applied to the facts here where, in many instances, the "change" occurred through sale by a pledgee. The other, in the case of the Comficor counts, 10-20, related to the phrase "the beneficial owner of more than 10 per centum of any class of any equity security." We find no merit in these contentions; indeed, they border on the frivolous. As said by Chief Justice Hughes in *Sproles* v. *Binford*, 286 U. S. 374, 393 (1932), "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."[2]

[2] Equally without merit is the contention that § 16(a) offends the due process clause of the Fifth Amendment because it does not apply to beneficial owners of, or to officers or directors of issuers of, "an exempted security," which, as defined in § 3(a)(12) includes not only certain defined securities but such others "as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this title which by their terms do not apply to an 'exempted security' or to 'exempted securities.'" See *Yakus* v. *United States*, 321 U. S. 414, 427 (1944).

(3) Reserving other general objections for later discussion, we turn to a review of the substantive counts. Here we can immediately dispose of Count 5, the charge of intentionally delaying the filing of Jacobs' annual report, as to which the proof was so overwhelming and the criticisms of the judge's charge so wholly unmeritorious as to make comment supererogatory.

Count 1, Guterma Form 4 Report, December, 1958: The government supported Count 1 by testimony of Morton Carlin, President of Judson Commercial Corporation, which had made loans to Guterma secured, among other things, by a pledge of Jacobs' stock, that in December, 1958 his company sold 4,600 shares of such stock through a broker; this was not contradicted. The question was whether Guterma knew of the sale. Carlin testified that he was in constant touch with Guterma and Eveleigh and also with Lipton, originally an employee of Guterma, who had become assistant treasurer of Jacobs but continued to keep Guterma's books and handled the details of his loan transactions. The court fairly reviewed this evidence and the defendants' criticisms of the charge are baseless.

Count 2, Guterma Form 4 Report, January, 1959: The government relied on two transactions, a sale of 3,000 shares by Judson Commercial Corporation, and a sale of 20,000 shares by Netherlands Trading Company as trustee for a concern known as UFITEC, these being a portion of 30,000 shares which Guterma had pledged as collateral to UFITEC. If the government had relied solely on the UFITEC sale, we would affirm despite appellants' contention that the sale was unauthorized. Whether it was in fact so may be debatable; but we regard this as immaterial since, the securities being negotiable, the sale effected a change in Guterma's beneficial ownership. Guterma was fully aware of what had occurred, he made no protest until the SEC charged him with failure to report, and the

judge charged, perhaps too favorably to Guterma, that if Guterma honestly believed that the stock had been sold by UFITEC in breach of an agreement, the jury could consider this on the issue of willfulness. However, the two transactions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale. See *United Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, 619 (1959). As to the latter, Carlin testified to sales of 3,000 of Guterma's shares in January, 1959; but it was brought out on cross-examination that the proceeds of these sales had been credited not to Guterma but to Comficor and that the error was not corrected until the summer or fall. While other testimony by Carlin could be interpreted as meaning that the facts were accurately shown in statements currently sent to Guterma's office, a sharp issue was created whether Guterma knew in January or February that these 3,000 shares were his, and therefore whether his failure to report the sale was willful within § 32(a). However, the charge omitted any reference to this Comficor complication, the judge denied a request to clarify this, and the prejudice was heightened by the fact that in discussing this count the judge said, "Carlin also testified that Guterma came to the Judson office and was personally told about the sales . . ." which, while correct as a general statement, had been specifically disclaimed as regards any personal conversation with Guterma as to the ownership of the 3,000 shares sold in January. To be sure, there is a certain unreality in supposing that the jury would remember these details from a charge taking nearly a hundred pages of the typewritten transcript; but so long as we observe the rite, we must serve it faithfully.[3]

[3] One is reminded of Judge Frank's remark as to the "unrealistic assumption that the incomprehensible words, uttered in the physical presence of the jurors, have some real effect on their thought processes." Courts on Trial, p. 117.

Appendix B.

Count 3, Eveleigh Form 4 Report, December, 1958: The government introduced a letter dated December 23, 1958 signed by Eveleigh to the Silver Company reciting his delivery of 2,000 shares of Jacobs stock "which I have requested you to sell for my account" and requesting payment of the proceeds, and testimony that Jerry Pressman of the Silver Company on the same day sold the shares and gave Eveleigh a check for the proceeds and that Eveleigh deposited the check in his bank account. Eveleigh countered with evidence that, shortly thereafter, he instructed his bank to transmit a slightly larger amount to another bank for the account of Jacobs. Pressman testified that when Eveleigh did this, Eveleigh remarked to him "Look what I have to do with my money." Any factual issue with respect to this count was fairly put to the jury.

Counts 10-20, Guterma and Eveleigh, Comficor-Form 4 Reports: The convictions on counts 10-20 relating to Comficor's failure to file Form 4 reports raise two general questions, one of law and the other of fact.

The question of law concerns what types of shares are to be considered in determining "any class of any equity security (other than an exempted security) which is registered on a national securities exchange," to which the 10% test of § 16(a) of the Securities Exchange Act is to be applied. Appellants say that all registered shares must be considered, including shares reserved for the exercise of options and for the exercise of conversion rights by preferred stockholders, which had been listed subject to notice of issuance; on that view the "class" would consist of 1,190,036 Jacobs shares. The government contends that only issued shares should be counted, or 882,607 for December, 1957–July, 1958, and 963,107 for November, 1958–January, 1959. In support of this it relies on SEC Rules X-16A-1 and X-16A-2. Rule X-16A-1 provides that "None of the reports provided for in § 16(a) need be made except as

provided in this rule." Rule X-16A-2, entitled "Ownership of More Than 10 Percent of an Equity Security" provides, so far as material,

> "In determining, for the purpose of rule X-16A-1, whether a person is the beneficial owner, directly or indirectly, of more than 10 percent of any class of any listed equity security, such class shall be deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer;"

Section 23(a) empowers the Commission "to make such rules and regulations as may be necessary for the execution of the functions" vested in it, but this, of course, would not permit the Commission to require an insider's report in cases beyond the statute's reach. Appellants claim this is what the SEC has done by Rule X-16A-2, since they read § 16(a) to mean 10% of the registered securities of any class, which, they say, would include securities listed subject to notice of issuance. We disagree with this reading. The phrase "which is registered on a national securities exchange" defines the type of equity security in respect of which insider reports are required, as is plain from the provision in the next clause requiring these reports of a person "who is a director or an officer of the issuer of such security." The question here is what shares are included in the phrase "any class of any equity security." It is hardly to be thought that the shares to which the 10% beneficial ownership test was to be applied should include shares which could not yet be beneficially owned since they had not been issued. Many corporations have registered and listed common shares for the conversion of debentures or preferred stock or the exercise of options, subject to notice of issuance, in amounts approximating the issued shares; appellants' construction would

mean that persons could acquire well over 10% of the outstanding common stock of such a corporation without complying with the reporting requirements of §16(a) and without liability under the short-swing provisions of §16(b). We hold that, in making issued shares the quantum to which the 10% test is to be applied, the SEC acted consistently with the language and purpose of Congress.

The government had difficulty in determining the precise number of Jacobs' shares owned by Comficor during the months for which violations were charged. Controversy rages over two exhibits in which the government summarized its version of the evidence as to the amount of Jacobs' stock held by Comficor during the critical months. The first exhibit, constructed from evidence as to purchases and sales by brokers, showed that Comficor had more than the required 10% in each month. The second exhibit sought to support the first by summarizing evidence as to how much Jacobs' stock was held for Comficor at the end of each month by pledgees and brokers who had not been paid; this met the 10% test except for December, 1958 and January, 1959, when liquidation by the lenders had begun. Appellants criticize the exhibits as including stock that was not Comficor's but belonged to Guterma or others. On the other hand, Lipton testified that Comficor's purchases and sales of Jacobs' stock were entered on its books in a separate account, that the purchase price for the Jacobs shares acquired by Comficor came out of its funds, that a separate account would have been needed if Comficor had bought shares as agent for others, and that there was no such account. The testimony created an issue of fact and the only criticisms of the court's charge on the Comficor counts were sufficiently met. Appellants say the task of weighing the evidence with respect to these complex financial transactions for each of eleven months was beyond the jury's capacity and that the jury perforce gave undue attention to the government's summary exhibits

rather than the testimony that underlay them. However, we find nothing misleading in the exhibits; and it was open to defendants to prepare counter-exhibits embodying their version of the evidence, as they did in connection with Count 9. If defendants chose to avail themselves of their constitutional right to a jury trial, they must take its frailties along with its strengths.

Count 9, Guterma and Eveleigh, Jacobs Form 8-K Report, January, 1959.

Section 13(a) of the Securities Exchange Act requires every issuer of a security registered on a national securities exchange to file "in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to § 12," the latter, containing the registration requirements for securities. Rule X-13A-11 requires every registrant to "file a current report on Form 8-K within ten days after the close of any month during which any of the events specified in that form occurs * * *" Item 2 of the form requires information "if the registrant or any of its majority-owned subsidiaries has acquired or disposed of a significant amount of assets, otherwise than in the ordinary course of business * * *" Instruction 4 defines "a significant amount of assets"; we quote this in the margin.[4]

[4] "4. An acquisition or disposition shall be deemed to involve a significant amount of assets (i) if the net book value of such assets or the amount paid or received therefor upon such acquisition or disposition exceeded 15 percent of the total assets of the registrant and its consolidated subsidiaries, or (ii) if it involved the acquisition or disposition of a business whose gross revenues for its last fiscal year exceeded 15 percent of the aggregate gross revenues of the registrant and its consolidated subsidiaries for the registrant's last fiscal year."

Appendix B.

The transaction claimed to have required the filing of a Form 8-K report by Jacobs for January 1959 was the pledge of all the capital stock and later of $763,000 of bonds and debentures and a promissory note of $2,630,000 of Grand Rapids Metalcraft Corporation, a wholly owned subsidiary, to Inland Credit Corporation, as security for a loan of $150,000. Prior to the Inland Credit loan Jacobs had pledged three promissory notes of Grand Rapids totaling $2,630,000 to James Talcott & Co. along with other collateral as security for certain loans. On January 6, 1959, Jacobs borrowed $150,000 from Inland Credit and pledged as security 34,578½ shares of the stock of Grand Rapids, these being all the issued and outstanding shares. On January 13 Jacobs delivered to Inland Credit additional collateral, to wit, "certain bonds and debentures issued by Grand Rapids Metalcraft Corporation, under its present or prior names, in the aggregate amount of approximately $763,000., and also a demand promissory note of even date made to our order by said Grand Rapids Metalcraft Corporation in the principal sum of $2,630,000 and endorsed by us." Jacobs represented and warranted that it was the sole owner "of all of the said bonds and debentures and that the same are not subject to any claim or lien and that the indebtedness evidenced by the said promissory note is due and owing and has not been assigned, transferred, pledged or paid either in whole or in part."

Appellants' first claim was that the pledge of the $2,630,000 note to Inland was not a disposition of an asset or, at least, not a disposition of the full amount of the note, since the note had already been pledged to Talcott. This was supported by testimony of a Talcott employee that the Talcott loans were not refinanced until February 5, 1959, the date also shown in the financial statements reported, with suitable qualifications, by Ernst & Ernst in November, 1959. Against this the government contended that the war-

ranty made by Jacobs, along with the change in reference from three notes aggregating $2,630,000 to a single note of that amount, showed that the three notes must have been returned by Talcott prior to January 13. Although the most plausible solution of the puzzle may be that Jacobs had Grand Rapids execute a new $2,630,000 note on January 13 in anticipation of the early refinancing of the Talcott loan, the charge fairly put the conflicting evidence to the jury, and the judge was justified in declining to give the further charge that Guterma asked. In any event the issue becomes moot in view of our reversal of the conviction on this count on another ground.

In order to apply the SEC instruction quoted in footnote 3, it is necessary to know "the net book value" of the assets disposed of, the numerator of the fraction, and "the total assets of the registrant and its consolidated subsidiaries," the denominator. The government produced two exhibits with respect to the denominator, one showing the total assets of Jacobs and its consolidated subsidiaries on January 31, 1959 to be $16,147,197 and the other showing these assets to be $17,044,881 as of the same date. Defendants offered an exhibit showing the total assets to be $17,940,502. All these exhibits seem to have been prepared on the basis of including as assets both the parent company's claims against and stock interest in consolidated subsidiaries and the total assets of the subsidiaries themselves, since the audited statements of Jacobs and its consolidated subsidiaries showed assets of only $6,110,533 as of July 31, 1958 and $5,916,207 as of July 31, 1959. While this method of computation produces a totally unrealistic figure, leading, for example, to the seemingly absurd result that a holding company with 25% of its assets in the form of claims against or stock interests in four newly organized consolidated subsidiaries could dispose of any one without having to file a Form 8-K report, at least it squares with

the literal words of the instruction, and, by inflating the denominator, is the construction most favorable to appellants. As to the numerator, the financial reports of Grand Rapids as of January 31, 1959 showed assets of $3,460,788 and liabilities other than stockholders "equity" of $4,874,891, these liabilities including the $2,630,000 of notes and additional long term debt of $763,175 due to Jacobs. The government claimed that the "net book value" of the pledged assets was $2,933,030, more than 15% even on defendants' figure of total assets; apparently this was the sum of two accounts on Jacobs' books, one entitled "notes Receivable," containing a balance of $2,630,000, and another entitled "Investment in Bonds of GRMC," having a balance of $303,030. The government supports this on the view that the numerator and the denominator of the fraction must be determined on a consistent basis. It says that if assets are used without regard to liabilities in computing the denominator, the numerator must be similarly computed, with a deduction of only such reserves, e.g., for depreciation, as would normally appear on the asset side of the balance sheet, and there would be none such with respect to securities. On the other hand, defendants presented a figure of the "net book value" of the pledged collateral as $1,985,607; this was obtained by taking the balances in the same two accounts listed above, then adding two other accounts entitled "Investment Grand Rapids Metalcraft" and "Investment-GRMC" with respective balances of $1,000 and $1,440,217, the latter evidently representing the investment in the stock, and finally deducting the balance, $2,388,640, in an account entitled "Reserve for Operating Losses of Grand Rapids Metalcraft Corporation." Defendants say deduction of the reserve was appropriate in determining the "net book value" of the Grand Rapids securities held by Jacobs. The government itself had introduced exhibits showing the book value of the pledge of the Grand Rapids securities as $1,979,072, a figure quite obviously ob-

tained by deducting the current liabilities of Grand Rapids from its assets as of January 31, 1959, treating the parent company debt as stockholders investment, and disregarding the investment in the stock.

After outlining most of this evidence the trial judge left it to the jury "as the ultimate triers of the facts in this case, to determine what weight, if any, you wish to place on the computations of Mr. Locke and Mr. Doyle [the government's witnesses] on the one hand, and those of Mr. Acker [the defendants' witness] on the other," and thereby determine "whether or not the net book value of the assets pledged constitutes more or less than 15 percent of the total assets of Jacobs and its consolidated subsidiaries." In doing this the judge gave the jury a task properly his own, namely, the interpretation of the term "net book value" in SEC Instruction 4 as applied to a pledge of securities. The conviction on Count 9 must therefore be reversed in any event; however, we think the court should have dismissed this count for failure of proof, at least on the interpretation of "total assets of the registrant and its consolidated subsidiaries" which the government's exhibits themselves adopted. Taking the lowest figure for such assets in any of the exhibits, the government was required to show that the "net book value" of the pledged collateral was some $2,422,000. It is arguable that use of the term "net" negatives reliance on gross figures even as to securities, at least where the facts suggest the gross carrying value of these to be inflated as they do here. To be sure, the figures resulting from applying the book reserve against Jacobs' investment or from treating Grand Rapids' obligations to Jacobs as if they were stock may be criticized as failing to reflect Jacobs' creditor position, although the force of any such criticism is considerably blunted when we learn from the audited financial statements that on February 5, 1959, Jacobs made a capital contribution of $2,190,459 to Grand Rapids "through cancellation of certain of its notes re-

ceivable" and that subsequent to October 15, 1959, the debt of Grand Rapids to Jacobs was subordinated to obligations incurred by Grand Rapids in the ordinary course of business. If defendants were justified in believing that the instruction required something other than a gross figure even for securities on facts such as were here presented, and we cannot say they were not, the government failed to substantiate a net figure meeting the 15% test. There was thus no basis for a finding that the violation of the 8-K reporting requirement, if any there were, was knowing and willful; we therefore do not reach the question whether the SEC's instructions are sufficiently intelligible to support a criminal conviction as a matter of due process.

(4) Relying on *United States* v. *Universal CIT Credit Corp.*, 344 U. S. 218 (1952), Guterma contends it was error for the court to impose separate fines on each substantive count since, as he alleges, the government's case was that the offenses sprang from a single impulse. On no view could *CIT* be reasonably claimed to prohibit separate punishment for the violations of § 16(a) involved in Counts 1 and 10-20, on the one hand, and for the violation of § 13(a) involved in Count 5, on the other. We deem it almost as clear that *CIT* does not preclude separate punishment for Guterma's failure to file a Form 4 report required of him as an officer and director, and his causing Comficor to fail to do so. The issue thus narrows itself down to whether *CIT* forbids separate fines on each of the 10 Comficor counts. We think not. Section 32(a) provides that "Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title" shall upon conviction be fined not more than $10,000, or imprisoned not more than 2 years or both. Section 16(a) requires the filing of reports "within ten days after the close of each calendar month * * *, if

there has been any change in such ownership during such month." To hold that each willful default in filing a monthly report is a separate offense is consistent both with the language of the statute and with the important purpose of achieving the timely filing of current information which Congress considered necessary for the protection of investors. There is no such legislative history here as the Supreme Court found so persuasive with respect to the Fair Labor Standards Act in *CIT*; furthermore changes in beneficial ownership are more discrete and independent than the normal situation with respect to employment at too low wages or too long hours. To such extent as precedents are helpful we find the instant case more analogous to *Ebeling* v. *Morgan*, 237 U. S. 625 (1915), *Badders* v. *United States*, 240 U. S. 391 (1916), and *Blockburger* v. *United States*, 284 U. S. 299 (1932), *see Palmer* v. *United States*, 229 F. 2d 861 (10th Cir. 1955), *cert. denied* 350 U. S. 996 (1956), all upholding separate punishment, than to *CIT*.

(5) Other objections raised by appellants can be briefly treated. There is no substance in the complaint that publicity prevented appellants from receiving a fair trial. Whatever force such a contention might or might not have had if appellants had been tried in the spring of 1959, *see Delaney* v. *United States*, 199 F. 2d 107 (1st Cir. 1952), the publicity had almost ceased by December 7, 1959, when the trial began, the only articles in the New York newspapers during the fall having been one in the World-Telegram on September 7 and two on the financial page of the Journal-American in September and October. Thirty-seven of forty-three veniremen testified they had never heard of any of the defendants and none of the other six sat on the jury. We cannot accept Guterma's claim that his case was so notorious that the veniremen must have been lying; it is a natural failing to believe the public are far more interested in one than they are and Guterma's argument would

have more plausibility if the charge against him had been rape or murder, see *Coppedge* v. *United States*, 272 F. 2d 504, 508 (D. C. Cir. 1959), than the violation of requirements about which few jurors have ever heard or even the looting of a company relatively unknown.

There was no error in the Court's charge as the meaning of "willful" as used in § 32(a), see Herlands, *Criminal Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139, 143-50 (1934). We have examined defendants' arguments as to the government's failure to produce documents in accordance with a pretrial order; we find either that the documents in question were outside the scope of the order or that defendants were not prejudiced in view of the adjournments given by the trial judge and his clear indication of willingness to grant longer ones if these were requested.

Finally we find no merit in Guterma's contention that the court contributed to his decision not to testify by declining to give an advance ruling limiting the extent to which he could be cross-examined on subjects involved in three other indictments, and that this was error. We are not aware of any requirement for such a ruling and Guterma had no reason to suppose objections to cross-examination would not be dealt with properly if he chose to take the stand.

The judgment of conviction is affirmed save as to Counts 2 and 9; the judgment is reversed as to Count 2 and the judgment is reversed and the indictment dismissed as to Count 9.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge
HON. CHARLES E. CLARK,
HON. HENRY J. FRIENDLY,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Alexander L. Guterma, Robert J. Eveleigh,

Defendants-Appellants,

F. L. Jacobs Co., Conficor, Inc., and Chatham Corp.,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to count nine of the indictment as to both appellants, be and it hereby is reversed with directions to dismiss.

Further ordered that the judgment as to count two of the indictment as to appellant Guterma be and it hereby is reversed.

Further ordered that the judgment in all other respects be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

By Niall F. O'Doherty
Chief Deputy Clerk

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Office-Supreme Court, U.S.
FILED
OCT 10 1960
JAMES R. BROWNING, Clerk

No. 323

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALEXANDER L. GUTERMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 323

ALEXANDER L. GUTERMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. II, 18-38; Pet. App. 55-74) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1960 (App. II, 18; Pet. App. 55). The peti-

[1] The record consists of nine volumes. Volumes one through seven, which are consecutively paginated, constitute the reporter's transcript of the trial and will be referred to as "Tr." The remaining two volumes are appendices of selected government and defense exhibits at the trial, and contain some of the proceedings in the trial court and court of appeals, to which reference shall be made as "App. I" and "App. II", respectively. In addition, we are lodging with the Clerk of this Court other government exhibits at the trial, which will be referred to as "G. Ex."

tion for a writ of certiorari was filed on August 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for willful failure to file certain reports under the Securities Exchange Act.

2. Whether petitioner had a fair trial.

3. Whether various rulings on the evidence were proper.

4. Whether portions of the Securities Exchange Act and rules promulgated thereunder are constitutional.

5. Whether cumulative fines were properly imposed.

STATUTES AND RULES INVOLVED

Section 16 of the Securities Exchange Act, 15 U.S.C. 78p., provides in pertinent part:

> (a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in

such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

* * * * *

Section 20 of the Securities Exchange Act, 15 U.S.C. 78t, provides in pertinent part:

* * * * *

(c) It shall be unlawful for any director or officer of, or any owner of any of the securities issued by, any issuer of any security registered on a national securities exchange, without just cause to hinder, delay, or obstruct the making or filing of any document, report, or information, required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title

Section 32 of the Securities Exchange Act, 15 U.S.C. 78ff, provides in pertinent part:

(a) Any person who willfully violates any provisions of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or docu-

ment required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

* * * * *

Rule 240.3b-1 of the Securities and Exchange Commission, 17 C.F.R. 240.3b-1, provides:

> The term "listed" means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in distributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

Rule 240.13a-1 of the Securities and Exchange Commission, 17 C.F.R. 240.13a-1, provides:

> Every issuer having securities listed and registered on a national securities exchange shall file an annual report for each fiscal year after the last full fiscal year for which financial statements were filed

in its application for registration. Registrants on Form 8-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate form.

Rule 240.16a-1 of the Securities and Exchange Commission, 17 C.F.R. 240.16a-1, provides in pertinent part:

* * * * *

(b) Every person who at any time during any month has been directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is listed on a national securities exchange, or a director or an officer of the issuer of such security, shall, if there has been any change during such month in his ownership of any equity security of such issuer, whether registered or not, file with each exchange on which any equity security of the issuer is listed and registered a statement on Form 4 (and a single duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month. Such statements must be received by the Commission and the exchange on or before the tenth day of the month following that which they cover.

* * * * *

(d) Every person who becomes directly or in-

directly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security), which is listed on a national securities exchange, or becomes a director or an officer of the issuer of such security, shall file with each exchange of which any equity security of the issuer is listed and registered a statement on Form 6 (and a single duplicate original thereof with the Commission) of the amount of all equity securities of such issuer, whether registered or not, so beneficially owned by him immediately after becoming such beneficial owner, director or officer. Such statement must be received by the Commission and the exchange on or before the tenth day following the day on which such person became such beneficial owner, director, or officer. Such person need not file the statement required by this paragraph, if prior to such tenth day and during the calendar month in which he has become such beneficial owner, director, or officer, there has been a change in his beneficial ownership which will require him to file a statement pursuant to paragraph (b) of this section with respect to the same securities.

* * * * *

Rule 240.16a-2 of the Securities and Exchange Commission, 17 C.F.R. 240.16a-2, provides in pertinent part:

In determining, for the purpose of § 240.16a-1, whether a person is the beneficial owner, directly or indirectly, of more than 10 percent of any class of any listed equity security, such class shall be

deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer; * * *.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals affirming his conviction on fourteen counts charging various violations of the Securities Exchange Act and conspiracy to violate the Act, arising out of petitioner's ownership of stock in and control of the F. L. Jacobs Company.[2] Count 1 charged that petitioner personally failed to file an "insider report" required under Section 16 (*supra*, pp. 2-3) for his insider dealings in the stock of Jacobs while he was an officer and director of that company. Counts 10 to 20 charged failure to file "insider reports" by petitioner's personal holding company, Comficor, Inc., when there were changes in Comficor's beneficial ownership of Jacobs stock at a time when Comficor owned more than 10% of Jacobs stock listed on a national securities exchange. Count 5 charged that petitioner and Robert Eveleigh obstructed the filing of the annual report of the Jacobs Co. for the year ending July 1958. Count 21 charged a conspiracy to violate the various substantive provisions of the Act and to defraud the functioning of the Securities and Exchange Commission (App. I, 15-40). Petitioner was sentenced to 4 years and eleven months on the conspiracy count (with lesser concurrent terms on the others), and to cumulative fines of $10,000 on each count, now totaling $140,000.

[2] The Court of Appeals reversed the convictions on two counts.

The evidence may be summarized as follows:

1. *Background: The "insider" trading in Jacobs stock, and the general scheme (Count 21).*

Petitioner and Eveleigh, who were directors, officers and substantial shareholders of the F. L. Jacobs Company, controlled the affairs of Jacobs from early 1957 until February 1959. Petitioner was chairman of the board of directors and president, while Eveleigh was vice president and treasurer (Tr. 533, 594, 989, 1013-1014, 1017, 1671, 1677; App. I, 131). During this period, petitioner maintained two personal holding companies—Chatham Corporation and Comficor, Inc. (formerly named Commercial Fidelity Corporation and, earlier, United States Totalisator Corporation)—and directed their affairs, with the assistance of Eveleigh, through dummy officers (Tr. 1043, 1447, 1515-1518, 1538, 1545-1546, 1549, 1557, 1740, 2208-2209, 2404-2406, 2413-2416, 2434, 2437-2441, 2444-2445, 2510, 2688-2691, 2702, 2706-2711, 2717-2724, 2764, 2770, 2777-2781, 3111-3117, 3122-3125).

Throughout 1958, funds passed freely between Jacobs, Comficor and Chatham (Tr. 1740-1749; see Tr. 2611, 2808). Eveleigh told Seymour Lipton, the assistant treasurer of Jacobs in New York (Jacobs maintained offices in New York and Detroit), to treat the funds of Jacobs, Comficor, Chatham, and the petitioner as "one kitty" (Tr. 1762). The flow of money from Jacobs to Comficor for the twelve month period ending July 31, 1958 (the close of the 1958 fiscal year), totaled $2,114,000, most of which was unsecured by Comficor (Tr. 1741-1742, 1760; see Tr. 1912-1913). While Jacobs'

books reflected that Comficor owed Jacobs approximately $33,000, the accountants, in January 1959, determined that Comficor was indebted to Jacobs in the amount of approximately $1,400,000 as of July 31, 1958 (Tr. 617-622; see Tr. 325-326, 915-916, 1912-1913).

Also throughout 1958, petitioner, Eveleigh, and Comficor pledged substantial quantities of their holdings in the common stock of Jacobs and most of the shares which Jacobs owned in the Scranton Corporation[3] with moneylenders as collateral on loans made to the petitioner, Eveleigh, Comficor, and Chatham (Tr. 1370, 1430-1432, 1435-1437, 1440, 1441, 1446-1449, 1452-1456, 1458, 1475-1476, 1514-1518, 1520-1521, 1536-1539, 1542, 1545-1546, 1548, 1551, 1557, 1563, 1569-1570, 1939-1943, 1951-1952, 1973-1975, 1989-1990, 2244, 2247-2249, 2252, 2291-2294, 2234-2236, 2341, 2348-2351, 3758-3763, 3770-3771; see App. II, 4b-10b). Petitioner handled many of the negotiations with the moneylenders for the Comficor loans (Tr. 1349, 1431-1432, 1515-1518, 1537-1536, 1538-1539, 1546, 1549, 1616-1617, 1634-1635, 1977-1978, 2227-2232, 2244, 2282-2283, 2334), and guaranteed most of the notes in evidence at the trial. The loan agreements contained margin provisions requiring the borrowers to post additional collateral or to pay down the loan in the event that the market price of Jacobs stock dropped.

The market price of Jacobs stock was maintained

[3] In February 1958, Jacobs sold one of its divisions to the Scranton Corporation for 40,000 shares of Scranton stock (Tr. 623, 2581-2582). On July 30, 1958, Jacobs sold two subsidiaries to the Scranton Corporation. None of these sales was recorded in Jacobs' financial books as of March 1959, the time when the management of Jacobs passed to trustees (Tr. 613-615, 1706-1707, 1713, 2848-2853).

through substantial periodic purchases of the stock by Comficor through eleven brokerage houses (Tr. 1137-1141, 1146-1149, 1154-1156a, 1169, 1178, 1180-1182, 1213-1214, 1216, 1227-1232, 1242-1247, 1263, 1265-1267, 1285-1288, 1313, 1315-1316). Petitioner and Eveleigh made the initial arrangements with the brokers and were kept regularly informed of market conditions and prices in Jacobs stock (Tr. 1136-1141, 1156-1159, 1176-1181, 1261-1264). The money for these stock purchases was obtained by Comficor from moneylenders, who accepted the stock purchased as collateral and remitted the loan proceeds to the brokerage houses to pay for the stock acquisitions (Tr. 1696, 1698-1699, 1773-1775; see Tr. 1269).

On September 4, 1958, petitioner and Eveleigh exercised options to purchase stock in Jacobs. In December 1958, petitioner and Eveleigh borrowed $200,000 from the Silver Company secured by 35,000 shares of this option stock (Tr. 1551; G. Exs. 123, 210, 211). Petitioner filed an "insider report" for his purchases of 50,000 shares of option stock (Tr. 1031-1032; App. I, 151-152). No reports were filed for the transactions involved in the substantive counts, *infra*, pp. 11-12.

2. *Count 1: Failure of petitioner to file an insider report.*

In December 1958, the Judson Commercial Corporation caused its brokerage house to sell 4,600 shares of Jacobs stock for the petitioner's account (Tr. 1947-1948). These shares constituted part of the collateral on a $42,000 loan made by Judson to the petitioner earlier in the year (Tr. 1942-1943, 1946-1948). Judson,

which was in frequent touch with the petitioner in December 1958 and January 1959, informed him of these sales by telephone, in person and by written notice (Tr. 1979-1985, 2025, 2212, 2217-2218, 2228). Petitioner did not file an "insider report" (Form 4) for December 1958 (Tr. 1032-1034).

3. Counts 10-20: Failure of Comficor to file insider reports.

From June 1955 until September 1958, the total number of Jacobs shares registered and listed on the New York Stock Exchange was 882,607 (Tr. 3702; *see* Tr. 1886). The total number of Jacobs shares registered and listed subsequent to September 1958 was 963,107 (Tr. 1011-1012, 1107-1111, 3703; *see* Tr. 1888). From December 1957 through July 1958, and from November 1958 through January 1959, Comficor owned more than 10% of Jacobs stock registered and listed on the New York Stock Exchange, and purchased and or sold Jacobs stock during these months (Tr. 1140-1141, 1146, 1149, 1158, 1169-1170, 1180-1181, 1213-1216, 1230-1233, 1244-1247, 1265-1268, 1287-1288, 1315-1316, 1321-1322, 1462-1465, 1470, 1473, 1564-1565, 1572-1573, 1578-1579, 1767, 1770-1773, 1970-1971; App. I, 123; *see* App. I, 124).[4] No Form 4's (insider reports) were filed on behalf of Comficor for these months (Tr. 1033-1034).

As indicating knowledge and willfulness, there was evidence that in March 1958, when the New York

[4] Since many of the loans made by the Silver Company to the petitioner, Eveleigh, and Comficor were cross-collateralized, the loans were regarded as "one big pot" for liquidation purposes on sale of collateral (Tr. 1578-1579).

Stock Exchange inquired of the petitioner whether Comficor had filed Form 4's with respect to Jacobs stock, petitioner replied that "they purchased and sold and that they did not have sufficient [stock] to report" (Tr. 4052-4053). Comficor's records, as early as December 31, 1957, disclosed that Comficor held more than 10% of Jacobs outstanding stock, and that its holdings were continually growing (Tr. 1770-1773). In June 1958, when the New York Stock Exchange was investigating the timing of Comficor's purchases of Jacobs stock, petitioner stated that "he was familiar with their [Comficor's] operations" (Tr. 4067).

Petitioner personally caused the opening of many Comficor accounts in various brokerage houses which purchased Jacobs stock for Comficor's account; considered the margin problems; kept a close check on market behavior in Jacobs stock; and occasionally placed orders on Jacobs stock for Comficor (Tr. 1137-1140, 1178, 1181, 1263, 1269-1270, 1282, 1763, 1767). On one occasion, stock purchased for the account of Commercial Fidelity Corporation (Comficor's earlier name) was personally delivered to the petitioner (Tr. 1158). Throughout 1958, petitioner negotiated for many of the loans to Comficor and guaranteed most of them (Tr. 1447, 1515-1518, 1538, 1545-1546, 1549, 1557, 2208-2209). When once questioned as to "who was Comficor", petitioner replied, "That's me" (Tr. 1299; see Tr. 1190, 1210-1211, 1516-1518, 1536, 1538-1559, 1964, 1968-1969).

4. Count 5: Obstructing the filing of an annual report of Jacobs.

In May 1958, the accounting firm of Ernst & Ernst discussed with petitioner and Eveleigh the impending audit of Jacobs for the fiscal year ending July 31, 1958 (Tr. 302, 306-309, 311-313). In a letter to the petitioner and Eveleigh on July 9, 1958, Ernst & Ernst stated that the audit would commence in a short time and that certain reports, supporting data, and audits of subsidiaries by others would be required (Tr. 521-523). Neither petitioner nor Eveleigh replied to the letter.

About July 15, 1958, William Carey of the New York office of Ernst & Ernst unsuccessfully tried to communicate with Eveleigh. Until he contacted Eveleigh in late September, Carey called the Jacobs' office once or twice a week (Tr. 874-881). Eveleigh told Carey that Jacobs' books were not ready to be audited and that he would telephone Carey when they were ready (Tr. 882). In several other telephone conversations at about this time, Eveleigh told Firman Haas of Ernst & Ernst's Detroit office that Jacobs' books were not ready for auditing. He gave no indication when they would be ready (Tr. 314-315). In September, Ernst & Ernst wrote petitioner and Eveleigh that little progress could be made on the audit until the main office books of Jacobs (New York) were prepared (Tr. 525-528). No answer to the September letter was received by Ernst & Ernst.

In late October, Carey spoke to Eveleigh and reminded him that the July 31st examination had not

yet begun, that the annual report on Form 10-K was due in about 30 days, and that the audited financial statements were part of the Form 10-K (Tr. 882-884, 895). Eveleigh stated that the books were not ready for auditing, and that he was going to go to Detroit to discuss the audit with Ernst & Ernst there. In a letter to the petitioner and Eveleigh in November, Ernst & Ernst requested Jacobs' monthly financial statements, and sought permission to review Jacobs' main office records (Tr. 315-317). No reply was made to this letter (Tr. 317).[5]

On December 1, 1958, Haas and Carey met the petitioner and Eveleigh in New York, and requested certain records and data which was needed for the audit (Tr. 318-322, 885-886).[6] The main office books of Jacobs were not made available to Ernst & Ernst prior to December 3, 1958, and "(v)ery little, if any", information was made available to Ernst & Ernst subsequent to that time (Tr. 321, 322, 326-329, 331, 335, 590, 598, 602, 629-630, 845, 847, 895-896, 906, 915-916). Haas testified that he was still waiting for some of the information which Eveleigh said was "in the office" (Tr. 335).

By February 1959, Ernst & Ernst had prepared an analysis of Comficor's account, and gave petitioner two confirmation letters showing that Comficor owed Jacobs

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[5] On November 25, 1958, Jacobs obtained a 60 day extension of time (from November 28, 1958) from the SEC within which to file its annual report on Form 10-K.

[6] For example, the auditors wanted to inspect the contracts pursuant to which Jacobs bought or sold assets or borrowed money. They wanted to know the location of Jacobs' 40,000 shares in Scranton and the location of stock of certain subsidiaries (Tr. 318-322, 625-628).

over $1,717,000 as of July 31, 1958. (G. Exs. 22, 23). At a subsequent meeting with Haas and Carey, petitioner said that the Comficor figures were incorrect, and that certain credits due Comficor from Jacobs would balance out the account as of July 31, 1958 (Tr. 325-327).[7] Neither the petitioner nor Eveleigh produced any supporting data with respect to these "credits," although the auditors said that they would welcome any such information.[8] At the close of this meeting, petitioner said to Haas, "Firm, we need you. I have been derelict in my duty and don't be too harsh with me" (Tr. 330).

The audit of Jacobs' books for the fiscal year ending July 31, 1958, was not completed due to a lack of information. Ernst & Ernst was unable to render an opinion on Jacobs' books or to certify the financial statements of Jacobs for the year ending July 31, 1958 (Tr. 337-338, 590, 630-631, 634, 845-847). No Form 10-K (annual report) was filed with the New York Stock Exchange for Jacobs' fiscal year ending July 31,

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[7] At this meeting petitioner told Haas that he knew the location of the "missing" Scranton shares. "There are 40,000 shares out for transfer with the transfer agent, and there are about 20,000 shares around the office" (Tr. 328). The auditors were not shown the 20,000 shares "around the office", and no verification was offered that 40,000 shares were with the transfer agent. The schedule which Eveleigh prepared for the "missing" 40,000 Scranton shares was "practically worthless" (Tr. 329). Most of Jacobs' Scranton shares had been pledged with moneylenders on loans to the petitioner and Comficor (Tr. 3758-3761, 3763, 3770-3771; App. II, 4-10).

[8] From August 1, 1958, to February 1959, Lipton met with little success in efforts to obtain data from the petitioner and Eveleigh on business transactions of Jacobs (Tr. 1680-1681, 1683-1685, 1690-1695, 1701, 1706-1707, 1711-1714, 1720, 1728-1731, 1743, 1745-1747, 1790, 1793, 1801, 1805-1806, 1848, 1851). Eveleigh denied financial information which Locke often requested (Tr. 2818-2823, 2838-2842, 2850-2860, 3283-3284, 3402, 3407, 3413).

1958, while petitioner and Eveleigh were associated with Jacobs (Tr. 1031). In December 1958, the New York Stock Exchange suspended trading in the stock of Jacobs.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 4, 5, 29-30) that the evidence is insufficient to support his conviction on Counts 1 and 10 through 20—involving the failure to file "insider reports." The evidence is uncontradicted that the "insider reports", required to be filed on Form 4 with the SEC and the New York Stock Exchange for the months indicated in those counts, were never filed with the SEC and the Stock Exchange (Tr. 1032-1034; G. Exs. 180, 181). As for Count 1, petitioner knew that Judson Commercial had caused 4,600 of his shares in Jacobs to be sold by its brokerage house in December 1958 (Tr. 1946, 1949, 1979-1985, 2125, 2212, 2217-2218, 2228, 4786). The fact that petitioner filed a Form 4 with the SEC for September 1958 when he acquired 50,000 option shares of Jacobs confirms other evidence introduced at the trial that he knew that he was obligated to file a Form 4 revealing the changes in the beneficial ownership of his Jacobs shares in December 1958 (Tr. 4052-4053, 4067; App. I, 141-152; G. Exs. 8, 9, 180). As for Counts 10 through 20, the evidence summarized in the Statement, *supra*, pp. 11-12, sufficiently indicates that petitioner not only directed the activities of Comficor, which included the buying and selling of Jacobs stock, but that he knew that Comficor, as a 10% owner of Jacobs shares listed on the New York Stock Exchange, was obligated to file Form 4's with the SEC and the

Stock Exchange indicating the changes in its beneficial ownership of Jacobs shares in December 1957 through July 1958, and November 1958 through January 1959. As such, petitioner was properly convicted as an aider and abettor under 18 U.S.C. 2.

Petitioner contends (Pet. 30-32) that additional shares of Jacobs common stock, which were authorized (but unissued) for the exercise of options and the conversion of preferred shares, should have been added to the shares listed on the New York Stock Exchange for the purpose of calculating Comficor's 10% beneficial ownership in Jacobs. He argues that the "plain meaning" of the term "listed", as defined in SEC Rule 240.3b-1 (17 C.F.R. 240.3b-1, *supra*, p. 4), is that "shares become listed at the time that the exchange grants the authority for them to be listed"; and points out that "authority had been granted by the Stock Exchange for the listing of 1,190,036 shares of Jacobs common stock." The contention, however, is not only bottomed on a misinterpretation of SEC Rule 240.3b-1, but ignores SEC Rule 240.16a-2 (17 C.F.R. 240.16a-2, *supra*, pp. 6-7) and the requirements for the listing of corporate shares on the New York Stock Exchange.

SEC Rule 240.3b-1, *supra*, p. 4, defines the term "listed" to mean "admitted to full trading privileges upon application by the issuer or its fiscal agent * * * and includes securities for which authority to add to the list on official notice of issuance has been granted." Although application for listing may precede notice of issuance of stock, stock is not "listed" on the New York Stock Exchange until official notice of issuance (usually by the transfer agent) has been received by

the Exchange (Tr. 3684-3685, 3689, 3703-3704; see Tr. 3690-3691). Petitioner's claim (Pet. 31) that SEC Rule 240.3b-1 means "that the shares become listed at the time that the exchange grants the authority for them to be listed" is, therefore, incorrect.[9]

Moreover, Section 16(a) of the Securities Exchange Act, *supra*, pp. 2-3, requires every person who is a beneficial owner of 10% or more of any class of equity security which is *registered* on a national securities exchange to file a report with the SEC and the securities exchange indicating the "amount of all equity securities of such issuer of which he is the beneficial owner", and to file a statement with the securities exchange and the SEC for each month during which there has been a change in such beneficial ownership. This monthly statement shall indicate "his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calen-

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[9] Petitioner states that (Pet. 31) "The evidence at the trial was clear that such authority had been granted by the Stock Exchange for the listing of 1,190,036 shares of Jacobs common stock, including 332,607 shares reserved for the conversion of outstanding preferred shares and for the exercise of options, and that no further authority was required from the Exchange for the listing of any of such shares." However, Edward Zuhr, the chief listing representative in the Department of Stock Lists of the New York Stock Exchange, testified that, although Jacobs applied for the listing of some of its common stock for purposes of conversion of outstanding 5% cumulative preferred stock, that particular common stock was never listed on the Exchange because neither Jacobs nor its transfer agent officially notified the Exchange that that particular common stock had been issued by Jacobs (Tr. 3683-3686; see Tr. 3703-3704). The "further authority" which the Exchange needed for the "listing" of that common stock, therefore, was official notice from Jacobs or its transfer agent that the stock had been issued.

dar month." SEC Rule 240.16a-1 (b) implements Section 16(a) by requiring every person who is the beneficial owner of more than 10% "of any class of any equity security (other than an exempted security) which is *listed* on a national securities exchange" to file, if there has been a change in his beneficial ownership of such equity security during any given month, "with each exchange on which any equity security of the issuer is *listed and registered*" a Form 4 indicating "his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month" (emphasis added). Since, in technical parlance, "registered" refers to stock registered with the SEC, and "listed" refers to stock placed upon a stock exchange for public trading (Tr. 3728-3729), it is obvious that the word "registered" in Section 16(a) has the same meaning as "listed" because it applies to stock placed on a national securities exchange for public trading. This is made explicit by SEC Rule 240.16a-2 (17 C.F.R. 240.16a-2, *supra*, pp. 6-7) which provides that, for purposes of determining the 10% beneficial ownership of listed securities, "such class shall be deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer." Since shares are not "listed" on the New York Stock Exchange until the Exchange is given "official notice of issuance" of such shares (Tr. 3684-3685, 3689, 3703-3704; see Tr. 3690-3691, 3702), only "issued" shares (which are "listed" on the exchanges) come within the ambit of

Section 16(a) and SEC Rules 240.16a-1 and 240.16a-2."

If unissued shares were to be added to the issued shares in determining the 10% beneficial ownership figure, the purpose of the statute would be defeated. It would be possible for a person beneficially to own more than 10% of the listed issued shares and still be insulated from filing Form 4's indicating changes in that ownership, for he would not be a 10% owner of the combined issued and unissued shares. The public which trades in issued shares would be deprived of access to the reports and information which the statute and the SEC rules seek to provide for them. See H. Rep. No. 1383, 73d Cong., 2d Sess. at 11-13; *Bank of America National Trust & Savings Ass'n* v. *Douglas*, 105 F. 2d 100, 103 (C.A.D.C.). As the court below observed (App. II, 30; Pet. App. 65), "It is hardly to be thought that the shares to which the 10% beneficial ownership test was to be applied should include shares which could not yet be beneficially owned since they had not been issued."

2. In varying forms, petitioner contends that he was deprived of a fair and impartial trial. None of the alleged bases for the contention has any merit.

a. Most of the publicity complained of (Pet. 7-10, 22-23) occurred well in advance of the trial. Only six out of 43 veniremen had heard of the petitioner and Eveleigh and none of those six sat on the jury (see,

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[10] The maximum number of Jacobs shares listed on the New York Stock Exchange during the months that Comficor failed to file Form 4's was 963,107 (Tr. 1887-1888, 3703-3704). Comficor owned at least 10% of those shares during the months when it failed to file Form 4's with the SEC and the New York Stock Exchange, showing changes in such ownership (App. I, 123).

e.g., Tr. 41, 78, 84, 118-120). No showing was made that the jury, during the trial, was in any way subjected to unfavorable publicity regarding the defendants in the case.[11] After the jury was sworn, the court admonished the jurors to keep an open mind throughout the case, and to refrain from discussing the case (until they had commenced their deliberations) with anyone, or from reading or listening to any accounts of the case, or from watching anything pertaining to the case over television (Tr. 128). This admonition was repeated in substance during the trial (Tr. 1421, 4829). In its instructions, the court told the jury that they were to determine the facts of the case from the evidence introduced at the trial, that their appraisal of the evidence which "came from the witness stand and from the exhibits received in evidence" was controlling, and that they could "only act upon evidence introduced upon the trial and from that evidence alone" (Tr. 4880-4887, 4892, 4934). The jury must be presumed to have followed these instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

b. The claim (Pet. 27-28) that the court improperly marshalled the evidence is without substance. The judge carefully and accurately summarized the evidence pertaining to the various counts in the indictment. A court, in summarizing the evidence, cannot go into all details. Its only duty is fairly and accu-

[11] During the trial, petitioner made only one motion for mistrial based upon adverse publicity. On inquiry by the court, however, petitioner's counsel admitted that he was the source of the offending news item (Tr. 1323-1326, 1395-1396).

rately to summarize the evidence adduced at the trial, and to inform the jury that the summarization is merely the court's recollection of the evidence, which, if contrary to the jury's independent recollection, need not be considered. *Starr* v. *United States*, 153 U.S. 614, 625; *Wiborg* v. *United States*, 163 U.S. 632, 656; *United States* v. *Murdock*, 290 U.S. 389, 394; *Quercia* v. *United States*, 289 U.S. 466, 470. Petitioner noted only eight exceptions to the portion of the court's charge marshalling the evidence. The suggestions which petitioner noted in six of these exceptions were promptly given to the jury in supplemental instructions (Tr. 4977-4982). The fact that the court refused to charge the jury with the suggestions embodied in the remaining two exceptions, which related to Counts 2 and 9, is immaterial, for there could be no prejudice to the petitioner on this score since his conviction on those counts was reversed on appeal.

c. There is also no substance to petitioner's claim (Pet. 25-26) that the Government disobeyed Judge Noonan's order of discovery,[12] thereby causing the defense "to prepare cross examination as testimony was elicited from the lips of Government witnesses without any of the advance preparation to which petitioner was

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[12] On November 13, 1959, more than three weeks before the trial commenced, Judge Noonan granted petitioner's motion for discovery, pursuant to Rule 16, F.R. Crim. Proc., as regards certain documents and information (App. I, 42-44). Discovery was granted, *inter alia*, to "all instruments, papers, documents and records of F. L. Jacobs Co. or others in the possession of the government by which it is alleged that the assets and credit of F. L. Jacobs Co. were transferred, assigned, pledged, hypothecated or otherwise encumbered and subjected to primary and contingent liabilities for the use, benefit and unjust enrichment of defendant, Guterma" (App. I, 43).

clearly entitled." Petitioner fails to point to any specific instance where the Government allegedly disobeyed the order of discovery. Petitioner was granted all that he was entitled to under that order. He was allowed to examine the original documents, and received photostats of all the desired papers several days in advance of the trial (Tr. 34). Before the trial commenced, petitioner requested only ready access to the material (Tr. 31-34). The court then informed the defense, "If you have any trouble at all, let me know because I certainly want you to have access to anything you need" (Tr. 34). During the trial, the court informed defense counsel that additional time would be allotted them within which to examine documents which were subsequently and voluntarily produced by witnesses, and, consistent with this purpose, the court on many occasions granted recesses or longer-than-usual lunch periods in order to allow defense counsel greater opportunity to examine documents (Tr. 1529-1531, 2239, 2241-2241a, 2520-2522, 2896-2897).[13] On one occasion the court excused a government witness in order to allow the defense an opportunity to examine newly produced documents (Tr. 1529-1531). As the court below correctly noted (App. II, 38; Pet. App. 74), "we find either that the documents in question were outside the scope of the order or that defendants were not

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[13] During the trial, most of the documents voluntarily produced by witnesses were shown to the defense in advance (*e.g.*, Tr. 2272-2273, 2523-2525). When the government had mistakenly failed to show certain exhibits to the defense in advance, the court either excused the witness then being examined or gave the defense all the time that it needed within which to inspect the exhibits in question (Tr. 1529-1531, 2241-2241a, 2523-2524).

prejudiced in view of the adjournments given by the trial judge and his clear indication of willingness to grant longer ones if these were requested."

3. The various objections to rulings on the evidence (Pet. 23-25, 26-27, 36-39) are without merit.

a. Government Exhibit 21, the financial statement of Jacobs for the year ending July 31, 1958, was properly introduced into evidence. This exhibit, which was prepared by Ernst & Ernst after petitioner and Eveleigh had left Jacobs, reflected items in Jacobs' books of account as adjusted by Locke, who, subsequent to March 1959, worked for the trustees (in reorganization) of Jacobs (Tr. 630-631, 657-658, 669-670, 678-681). The exhibit was admitted into evidence subject to proof by the Government of the foundation for Locke's adjustments (Tr. 875-878).[14] Locke later testified that his adjustments did not represent "opinion", but that they were based upon a worksheet prepared by Lipton before March 1959, specific agreements and letters found in Jacobs' files, and various mechanical adjustments (Tr. 2847, 2861-2862, 2910, 3234-3235, 3301). The mere fact that Ernst & Ernst was unable to certify the accuracy of the exhibit because specific financial information was unavailable for completion of audit purposes (Tr. 843-847) does not detract from the admissibility

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[14] A few moments before the government rested its case, counsel for Eveleigh noted that Government Exhibit 21 was admitted subject to a motion to strike at the close of the government's case (Tr. 3999, 4004). None of the defendants moved to strike the exhibit at that time. Counsel for Eveleigh, who had used the exhibit in cross examination (Tr. 3981), subsequently relied upon it during his summation (Tr. 4647-4650).

of the exhibit, for any attack on the accuracy of the underlying book entries of a summary goes to the weight, not the admissibility, of the summary in question. *Rudin* v. *United States*, 254 F. 2d 45, 49 (C.A. 6), certiorari denied, 357 U.S. 930. Moreover, petitioner cannot be heard to complain that the summary is intrinsically inaccurate when any inadequacy is due to his neglect, as a fiduciary, in maintaining complete and accurate records. *Bowen* v. *United States*, 153 F. 2d 747, 751 (C.A. 8), certiorari denied, 328 U.S. 835. Cf. *Brady* v. *United States*, 26 F. 2d 400, 402 (C.A. 9), certiorari denied, 278 U.S. 621.

b. At the trial, petitioner sought an advance ruling from the court that the Government could not cross-examine him in areas relating to the subject matter of three other indictments pending against him. The court held that it could not make such a ruling "in vacuum", that its function was not to give "academic opinions", and that it would rule upon questions propounded to the petitioner if and when he took the witness stand (Tr. 2491-2495, 4117-4120, 4191-4194).[15] The court held that the scope of cross-examination would have to remain within the bounds of Supreme Court decisions and *United States* v. *Provoo*, 215 F. 2d 531 (C.A. 2). It cautioned the Government to use "restraint" in this area and to approach the bench if there was any doubt concerning the propriety of a question (Tr. 2491-2495, 4117-4120, 4191-4194). Petitioner's

[15] The trial court, in noting that there was no authority for such an advance ruling, stated that "in this area here the practice is sometimes to rule on the issue even to the point of making the prosecution state its questions in writing ahead of time" (Tr. 1258-1260, 2492).

complaint (Pet. 36-39)—that the refusal of the court to make such an advance ruling was an abuse of the "prosecutorial function"—is without substance in law and logic. It cannot be seriously contended that the trial court should delimit the scope of questions which have not been formulated and an examination which has not yet commenced, as respects a party who may never become a witness. As the court below correctly noted (App. II, 38; Pet. App. 74), "We are not aware of any requirement for such a ruling and Guterma had no reason to suppose objections to cross-examination would not be dealt with properly if he chose to take the stand." [16]

c. Petitioner contends (Pet. 23-25) that the trial court erred in refusing to strike paragraph 7 of the conspiracy count (Count 21), which charged that it was a part of the conspiracy for the defendants and the co-conspirators to transfer and pledge the assets of Jacobs for the unjust enrichment of the petitioner and others.[17]

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[16] The trial court concluded that petitioner was "not acting in good faith" in pressing his application to limit cross-examination (Tr. 4191). On December 17, 1959, counsel for petitioner indicated that petitioner would testify on his own behalf (Tr. 1259). On January 20, 1960, counsel indicated that petitioner would not testify (Tr. 4101). The following morning, counsel stated that petitioner would testify if he received the advance ruling indicated (Tr. 4117). When the trial court refused to make such a ruling, counsel announced his "final conclusion"—that petitioner would not take the witness stand (Tr. 4117-4118, 4191).

[17] Paragraph 7 of Count 21 provides as follows (App. I, 34-35): "It was further a part of said conspiracy that the defendants Alexander L. Guterma, Robert J. Eveleigh, F. L. Jacobs Co., Conficor, Inc., Chatham Corporation, and co-conspirators Austin J. Hare, Salvatore R. Pavis, Garland L. Culpepper, Jr., and Seymour B. Lipton would transfer, assign, pledge, hypothecate, and otherwise encumber and subject to primary and contingent liabilities and caus-

Petitioner's claim is that, as a result of this paragraph, the "floodgates" were opened to the receipt of irrelevant and prejudicial evidence of corporate looting and stock manipulation. The evidence, however, was admissible, and the judge properly instructed the jury as to the crimes charged.

As the court below held (App. II, 23; Pet. App. 60), "it was relevant for the government to show that the conspiracy was motivated by a scheme to appropriate assets of Jacobs for defendants' benefit and to demonstrate what the facts were that defendants allegedly wished to conceal from the SEC and the public."[18] Had Jacobs' annual report on Form 10-K for 1958 and Comficor's insider reports on Form 4 been filed with the SEC and the New York Stock Exchange, the government, the Exchange and the investing pub-

to be transferred, assigned, pledged, hypothecated, and otherwise encumbered and subjected to primary and contingent liabilities, assets of F. L. Jacobs Co. for the purpose of making the assets and the credit of F. L. Jacobs Co. available for the use, benefit and unjust enrichment of defendants Alexander L. Guterma, Robert J. Eveleigh, Comficor, Inc., and Chatham Corporation."

[18]As indicating motive for failure to file, the government, in addition to evidence of trading in stock by petitioner and Comficor, did show "looting" of Jacobs. *E.g.*, in December 1957, Comficor, as payee of a $250,000 note, sold the note, for the face amount plus accrued interest, to Jacobs, and then collected the face amount of the note from the maker (Tr. 1749-1752). Petitioner and Eveleigh directed the formation of the Classic Carpet Corporation from which Jacobs purchased for more than a million dollars an inventory of automobile fiber mats, half of which it already owned (Tr. 845, 1752-1755, 2882-2886, 3028-3041; G. Ex. 477-485). To effect this purchase, Jacobs authorized the issuance of irrevocable letters of credit, charged against its accounts, in favor of Classic Carpet (Tr. 845, 1752-1757, 3028-3041). None of these obligations was recorded on Jacobs' financial books (Tr. 793, 1757). Following its discount of the letters of credit, Classic Carpet, in a series of payments, disbursed $689,000 to the petitioner, Comficor, and Chatham (G. Ex. 397-398, 435-443, 478-485).

lie would have been made aware of the fact that, while Jacobs' assets were diminishing at a substantial rate, the market value of its stock was being artificially maintained through substantial periodic stock purchases by Comficor. See the Statement, *supra*. It is well established that evidence of the commission of state and local offenses is admissible where it relates to or reveals the purposes underlying a federal conspiracy. *Giordano* v. *United States*, 251 F. 2d 109, 111, 115 (C.A. 8), certiorari denied, 356 U.S. 973 (conspiracy to violate internal revenue laws; evidence of counterfeit city tax stamp die used to defraud city of tax revenue held admissible); *Fields* v. *United States*, 228 F. 2d 544, 547-548 (C.A. 4), certiorari denied, 350 U.S. 982 (conspiracy to defraud citizens of federal rights; evidence of violation of state election laws held admissible). Moreover, it was proper to show that petitioner shared in the fruits of the conspiracy (*i.e.*, loans to the petitioner secured by Jacobs' assets) in order to establish the requisite intent. *United States* v. *Johnson*, 254 F. 2d 175, 176 (C.A. 2). See also *United States* v. *Crowe*, 188 F. 2d 209, 212-213 (C.A. 7); *United States* v. *Feldman*, 136 F. 2d 394, 399 (C.A. 2), affirmed, 322 U.S. 487; *United States* v. *Puff*, 211 F. 2d 171, 175 (C.A. 2), certiorari denied, 347 U.S. 963. At the close of the instructions, petitioner requested the court to grant his jury request No. 59. In a manner which was satisfactory to the petitioner, the court instructed the jury, "That if you find that the only purpose of this conspiracy was so that the defendants could loot the assets of the Jacobs Company for their own benefit, that would not in itself constitute a crime; it

would be evidence which you might consider, though, in determining whether they had defrauded the United States in the exercise of its governmental function" (Tr. 4987).

The trial court instructed the jury on the elements of the offenses which they must find beyond a reasonable doubt in order to convict on Counts 1, 5, and 10-20; dissected the evidence relating to these counts; and reminded them that their recollection of the evidence was controlling (Tr. 4899-4950). With respect to the conspiracy count, the court instructed on numerous occasions that the petitioner and the other defendants were charged with conspiring to "violate the provisions of the Securities Exchange Act of 1934 and to defeat the official functions of the SEC" (Tr. 4894-4895, 4951-4953, 4959-4960, 4963, 4969, 4970); that in order to convict any of the defendants on the conspiracy count the jury must find that the conspiracy charged in this count existed; and that the defendants participated in the conspiracy with knowledge of its objectives (Tr. 4959-4960, 4970). It also charged that "(e)ach count of the indictment must be considered separately, and the guilt or innocence of each defendant referred to in that count must be determined separately" (Tr. 4973). These instructions, which satisfied the petitioner,[19] must be presumed to have been fol-

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[19]Aside from request No. 59, referred to in the text, *supra*, which was granted, petitioner's only other request to charge regarding the conspiracy count, made at this time, concerned its request No. 53. That request, which dealt with reasonable doubt in connection with the conspiracy, was denied on the ground that the court had previously charged on the "elements of the crime and reasonable doubt" (Tr. 4985-4986).

lowed by the jury. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.[20]

4. Petitioner challenges the constitutionality of several portions of the Securities Exchange Act and SEC Rule 240.16a-1 (17 C.F.R. 240.16a-1, *supra*, pp. 5-6) promulgated thereunder. These contentions are insubstantial.

a. Petitioner first contends (Pet. 28-29) that Section 16(a) of the Securities Exchange Act, *supra*, and SEC Rule 240.16a-1 are invalid on the ground that they are "so vague and indefinite in their meaning as to fail to establish an ascertainable standard of guilt." Although he does not here specify his contentions, his challenges to Section 16(a) were considered by the court below (App. II, 24; Pet. App. 61):

> One relates to the phrase requiring a report of "any change in such ownership during such month"; this is asserted to be too vague, at least as applied to the facts here where, in many instances, the "change" occurred through sale by

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[20] *Parr* v. *United States*, 363 U.S. 370, on which petitioner relies (Pet. 23, 25), is inapposite. In that case this Court held that although the evidence disclosed a scheme to defraud, it did not disclose that the mails were used in furtherance of that scheme. *Id.* at 381-383, 389-393. The Court noted (*id.* at 393-394) that the government's evidence, which indicated the commission of state crimes, did "not establish the federal crime of using the mails to defraud", and that "no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." In the instant case, however, the evidence sufficiently shows that petitioner willfully failed to file the proper forms with the authorities, that he and Evenchik hindered and obstructed the filing of Jacobs' annual report for 1958, and that he and others conspired to violate these provisions of the Securities Exchange Act and to defraud the United States of a governmental function. See the Statement, *supra*.

a pledgee. The other, in the case of the Comficor accounts, 10-20, related to the phrase "the beneficial owner of more than 10 per-centum of any class of any equity security." We find no merit in these contentions; indeed they border on the frivolous. As said by Chief Justice Hughes in *Sproles* v. *Binford*, 286 U.S. 374, 393 (1932), "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."

There is no need for the Securities Exchange Act or the SEC rules to define "beneficial ownership" as appearing in the statute and rules, as petitioner contends (Pet. 30). That term is distinguished from "record ownership" (Tr. 1104-1106; see Tr. 4943), and is one whose appearance is "quite frequent in the law." *Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118, 127-128; see and compare, *Miller* v. *Strahl*, 239 U.S. 426, 434; *Sproles* v. *Binford*, 286 U.S. 374, 393. Petitioner, apparently, had no trouble in understanding the term when he told the New York Stock Exchange that Comficor lacked sufficient stock in Jacobs to report on Form 4's (Tr. 4052-4053, 4076).

b. There is no merit in petitioner's challenge to the constitutionality of Section 32(a) of the Securities Exchange Act, *supra*, pp. 3-4 (Pet. 23-36) on the ground that the final clause of that section shifts the burden of proof of the element of willfulness to the petitioner. In Section 32(a), Congress made it a crime, subject to fine and/or imprisonment, willfully to violate the Securities Exchange Act or any rule or regulation promulgated

thereunder. In the final clause of that section, Congress limited the punishment to a fine where the violator of a rule or regulation (not the statute) could prove that "he had no knowledge of such rule or regulation." In other words, Congress allowed "ignorance of the law" (*i.e.*, ignorance of a rule or regulation) to be interposed as a defense where the violator is proceeded against for violation of a rule or regulation—not where he is proceeded against, as here, for violation of the statute itself (App. 1, 15, 19, 23-33). See H. Rep. No. 1838, 73d Cong., 2d Sess., at 38 (House Conference Report). Thus, the clause which petitioner attacks is not even applicable to his case.

One may willfully commit a crime without having specific knowledge of the statute making the act a crime. The word willful means no more than the act must be done deliberately, rather than accidentally. *Browder* v. *United States*, 312 U.S. 335, 341-342. There is thus no inconsistency between a provision punishing willful conduct and another provision lessening the penalty where it is shown that the willful conduct was undertaken without knowledge of the regulation. In this case, the indictment charged that the acts were done willfully and knowingly, and, as discussed *supra*, the evidence shows that petitioner did in fact have knowledge of his duty to file Form 4's.

5. Petitioner contends (Pet. 39-44) that the imposition of $10,000 fines on each of the counts on which he was convicted contravenes the "policy of lenity" announced by this Court in *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218, and other cases. Count 1 (relating to petitioner's personal duty to file a Form 4) and Count 5 (relating to the annual

report) refer to matters clearly distinct from Counts 10 through 20 (relating to reports by Comptroller) (App. I, 15, 18-19, 22-33). As for Counts 10 through 20, the statute and its legislative history support the holding that willful failures to file monthly reports required under the Act constitute separate offenses for each failure to file a monthly report. Section 16(a) requires the filing *each month* of a Form 4 in certain contingencies, and Section 32(a) punishes *any violator* of *any* provision of the statute or rules or regulations promulgated thereunder. See also, H. Conf. Rep. No. 1838, 73d Cong., 2d Sess. at 38. These sections must not only be read together, but they must be read against the background of the legislative history of the Securities Exchange Act which seeks to provide prompt disclosure in protecting the investing public. See H. Rep. No. 1383, 73d Cong., 2d Sess., at 11-13; *Bank of America National Trust & Savings Ass'n.* v. *Douglas*, 105 F. 2d 100, 103 (C.A. D.C.).

The *Universal C.I.T.* case is inapposite since the statutory and regulatory scheme of the Securities Exchange Act and its legislative history are not analogous to the provisions of the Fair Labor Standards Act at issue there. In that case, this Court pointed out that the original bill came to the Conference from the House of Representatives with the separate offense clauses specifically deleted, while the Senate had retained one of two separate offense clauses, and that "[t]he Conference accepted the House version, with neither separate offense clause, but raised the maximum fine to $10,000." 344 U.S. at 223-224. See also, H. Rep. No. 2182, 75th Cong., 3d Sess., p. 14. But the penalty provision of the instant statute, penalizing any violator of

any provision of the statute or rule or regulation, is substantially the same as the House and Senate versions which came to and which were adopted by the Conference Committee. See H. Conf. Rep. No. 1838, 75d Cong., 2d Sess., at 38. As the court below correctly pointed out (App. II, 37; Pet. App. 73), "There is no such legislative history here as the Supreme Court found so persuasive with respect to the Fair Labor Standards Act in *CIT*; furthermore changes in beneficial ownership are more discrete and independent than the normal situation with respect to employment at too low wages or too long hours." In this case the evidence shows numerous separate transactions involving the acquisition and disposition of stock; the factual situation was subject to constant change, calling for individual determinations as to whether or not to comply with the law. The failure to file each month was therefore a separate managerial decision arising from a separate impulse and properly subject to a separate fine.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 323

ALEXANDER L. GUTERMA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

Preliminary Statement

In its brief, the Government has chosen to emphasize factual questions which petitioner covered fully in his briefs in the Court of Appeals but which did not appear appropriate for inclusion in a petition for certiorari, under this Court's Rule 19. Since the Government has now raised them, however, petitioner will dispose of them in this reply brief.

Count 1

In its brief in opposition, the Government says that "There is no merit to petitioner's contention that the evidence is insufficient to support his conviction on Counts

1 and 10 through 20—involving the failure to file 'insider reports' " (Govt. Brief, p. 16). With respect to Count 1, the Government says at pages 10 and 11 of its brief:

> "In December 1958, the Judson Commercial Corporation caused its brokerage house to sell 4,600 shares of Jacobs stock for the petitioner's account (Tr. 1947-1948). These shares constituted part of the collateral on a $42,000 loan made by Judson to the petitioner earlier in the year (Tr. 1942-1943, 1946-1948). Judson, which was in frequent touch with the petitioner, in December 1958 and January 1959, informed him of the sales by telephone, in person and by written notice (Tr. 1979-1985, 2025, 2212, 2217-2218, 2228). Petitioner did not file an 'insider report' (Form 4) for December 1958 (Tr. 1032-1034)."

And, at page 16 of its brief, the Government states that "As for Count 1, petitioner knew that Judson Commercial had caused 4,600 of his shares in Jacobs to be sold by its brokerage house in December 1958 (Tr. 1946, 1949, 1979-1985, 2125, 2212, 2217-2218, 2228, 4786)".

Apart from the fact that no Form 4 report was filed by petitioner for the month of December 1958, this statement of the case relating to Count 1 bears slight resemblance to the facts as developed at the trial.

The Government's claims in Count 1 that such shares were owned by petitioner, that petitioner knew of such sales, had such knowledge on or before January 10, 1959, and that he wilfully and knowingly failed to report such sales. Wilfulness is an essential element of the offense charged. Absent proof that petitioner was aware that such sales had been made, and had wilfully failed to report them, such conviction cannot be sustained.

The Government has relied as to this solely upon the testimony on direct examination of Morton C. Carlin, of Judson Commercial Corporation. Carlin's entire testimony is of such a character as to be unworthy of belief.

and is indeed refuted by his own records and those of the Securities and Exchange Commission. On April 27, 1960 (shortly after the trial herein), in the Southern District of New York an injunction was issued, on consent, permanently restraining Carlin, Judson Commercial Corporation, and Joseph Wolfe from further violation of the fraud provisions of the Securities Act. (*Securities and Exchange Commission* v. *Carlin, et al.*, Civil Action No. 60 Civ. 1713.) Such action was based, in part, on Judson and Carlin taking securities which had been pledged with them as collateral for loans, and re-pledging such shares with sub-lenders without the knowledge or authority of the pledgors which is precisely what they did with petitioner's shares here.

On direct examination (Transcript, pp. 1940-42), Carlin testified that in the period from April 29, 1958, through May 9, 1958, he had sold 3,200 shares of F. L. Jacobs Co. stock belonging to petitioner which had been deposited with him as collateral on a loan made by him eleven days prior thereto (April 18, 1959), in an amount of $25,000.

On July 31, 1958, he sold an additional 1,000 shares which were collateral under this loan (Transcript, p. 2044). At that time he had realized proceeds of more than $24,000 under this loan of $25,000. And, on August 10, 1958, although a balance of $785 was all that was due under this loan, he sold another 4,000 shares of this same collateral for an additional $23,357.47.

Although he had realized more than $47,000 from the sale of collateral under a loan of $25,000, on August 20, 1958, he billed petitioner for monthly interest for the entire $25,000 amount of the loan, and continued to do so throughout the year, and he did not reflect any of the proceeds of such sales on the loan ledger card. (Transcript, pp. 2044-45, 2053, 2058, 2976, Exhibits ZZ and CCC).

Carlin also testified that in connection with a loan of $12,000 which he made to Comficor on December 17, 1958,

he received collateral of 2800 shares of Jacobs stock. The interest on this loan was prepaid, and he received a bonus of $450. Carlin testified and his records showed that between January 26, 1959, and February 17, 1959, he sold all 2800 shares for total proceeds of $16,010.57, $4,010.57 more than the amount of the loan. He did not notify Comficor of this, or turn over such surplus to them. Instead, he retained the $4,010.57 for himself as "an additional bonus on termination" and so marked his records (Transcript, pp. 2099-2195).

The transaction upon which the Government sought a conviction on Count 1 was the sale by Judson Commercial Corporation through Hertzfeld, Stern & Co. on December 24, 1958, of 4,600 shares of Jacobs stock belonging to petitioner, the settlement date of such sale being January 2, 1959. Carlin shrouded such sale in secrecy. Although he and Judson Commercial Corporation maintained brokerage accounts in their own names, the Hertzfeld Stern account was opened in the name of a minor employee, one Nathan W. Natsil (Transcript, pp. 1946, 1949).

Significantly, on March 6, 1959, Miss Eileen Evers, a member of the SEC legal staff, and Charles Greene, an SEC investigator, executed a joint affidavit filed in the District Court in the matter of *Securities and Exchange Commission* v. *Guterma* (Civ. No. 143-53), to which they attached a schedule of F. L. Jacobs Co. common stock pledged with various lenders, including Judson Commercial Corporation, and which schedule listed all shares so pledged, and all sales which had occurred of any such pledged shares (Exhibits SSS, OOOOOOO, PPPPPPP, QQQQQQQ, Guterma Appendix 184a-188a, Transcript, pp. 4179-4190, 4199-4208).

In such affidavit they stated that the schedule (Exhibit SSS) was based, among other things, upon the files of the money lenders who had done business with petitioner, Comficor, F. L. Jacobs Co., Chatham Corp., and Eveleigh, and

upon "interviews with the principals or officers of" such lenders.

The schedule contained in Exhibit SSS states that, on the basis of such records and such interviews, Judson Commercial Corporation made *no* sales of F. L. Jacobs Co. stock until January of 1959, that Judson Commercial Corporation still had on hand 21,200 shares of F. L. Jacobs Co. stock pledged with it, and that the sales effected by Judson were made through the brokerage firm of L. D. Sherman Co., Alkow & Co., Casper Rogers & Co., and Cohen Simonson & Co.

Thus, as of March 6, 1959, there was no record of any sales made in December, 1958, or made at any time through Hertzfeld Stern & Co., through whom the Government has claimed that 4,600 shares of Jacobs stock belonging to appellant were sold by Judson in December, 1958. And it will be recalled that such sales were made by Judson in the name of Natsil, its "minor employee" (Transcript, p. 1949). Looked at together with Judson's prior transactions under the April 1958, and December 1958 loans, a pattern appears whose only purpose could be to dispose of collateral and pocket the proceeds without the knowledge of the borrower.

Nor is there a basis for the statement that petitioner was informed about the sales. To the contrary, Carlin testified that he could not say that he knew that appellant was personally told about the sales.

Throughout Carlin's testimony he conceded that his communications and conversations were generally with Eveleigh and Lipton, and that he did not have any direct conversation with petitioner until some time in January 1959 (Transcript, p. 1980).

In the Court of Appeals, the Government claimed that petitioner was informed of Judson's sale of this stock by a telegram (Def. Ex. J3) in which Judson informed peti-

tioner that "due to the decline in the value of your collateral it is imperative that you send us your check for $10,000 by one P.M. Friday or we shall proceed to liquidate your account." The Government asserted that, in the face of these alternatives, petitioner's decision was "do not pay."

But this telegram was sent to petitioner by Judson Commercial Corporation on October 17, *1957*—one year and two months prior to the transactions involved in the indictment (Transcript, pp. 2086-87). It was placed in evidence to show that when Judson and Carlin in the ordinary course of their business were going to notify customers including petitioner of proposed sellouts of collateral they sent notice by telegram. And Carlin admitted that, although he had looked through his files for all papers and records relating to his loans to appellant on Jacobs stock at the request of the Government before coming to court, he had not found any telegram sent to petitioner relating to sales of Jacobs stock belonging to petitioner, and that he had no recollection of having sent such telegrams (Transcript, pp. 2086-2090).

There is one additional matter to be commented upon in connection with Count 1. In February of 1959, after the commencement of the civil proceedings by the Securities and Exchange Commission, there was full and public discussion and information concerning the sales of pledged Jacobs shares by lenders. This was extensively discussed in the proceedings before Judge Sugarman, and petitioner in such proceedings undertook to file the required Form 4 Report concerning any such sales by lenders of stock owned by him of which he had knowledge.

Petitioner in fact filed such a report with the Commission and the Exchange (Exhibit KKK for identification, App. pp. 152-157). It is inconceivable that, had petitioner known of any such sales by Judson, he would not have included them with the sales by Silver Company and Ufitec which were included in such report. Such report

was filed with the necessary explanatory matter as the result of petitioner's undertaking to do so before Judge Sugarman on February 23, 1959 (*S.E.C. v. Guterma; supra*, Transcript, pp. 328-338). Judge Sugarman said "If this man can make himself whole with the requirement of the law, then he should be given the opportunity to do so." To which Mr. Windels replied: "That is quite true and he will be." (*S.E.C. v. Guterma*, Transcript, p. 332).

A copy of such report, accompanied by a certificate of the Securities and Exchange Commission that it was a full, true and complete copy of such report was offered in evidence by petitioner. The Government had previously offered and the Court had admitted every Form 4 Report filed by petitioner other than this, *with a certificate from the SEC that as of February 10, 1960, no other reports had been filed by appellant.* (Ex. 180). *The February 27th report* was excluded (Transcript, 4321-26) on the ground that it was self-serving, although Rule X-16A-3(e) provides that such reports may contain any relevant explanatory matter. It is submitted that such exclusion was erroneous and prejudicial, and contrary to the provisions of Title 28, U.S.C., Section 1733(b), Rule 27 of the Criminal Rules, and elemental principles of justice and fair play.

Counts 10 Through 20

With respect to Counts 10 through 20, the Government erroneously states at page 7 of its brief that "Counts 10 to 20 charged failure to file 'insider reports' by petitioner's personal holding company, Comficor, Inc., when there were changes in Comficor's beneficial ownership of Jacobs stock at a time when Comficor owned more than 10% of Jacobs stock listed on a national stock exchange."

This is a complete misstatement of all of the essential elements in such counts.

There is no reference in the indictment to *listed* shares. The charge made is that Comficor was the beneficial owner of more than ten per cent of an equity security *registered*

on a national securities exchange, "namely the common capital stock of F. L. Jacobs Co.".

Nor is there any reference in the indictment to Comficor as a "personal holding company of petitioner". Indeed, no allegation is made as to any relationship existing between petitioner and Comficor. It does not allege that petitioner was an officer, director, or stockholder of Comficor, or in any way responsible for the filing of reports by Comficor. It does not allege that petitioner had any obligation to cause Comficor to file such reports. It alleges the obligation of Comficor to file such reports, and the nonfiling of them, and names petitioner as an aider and abettor.

The offense charged in Counts 10-20, which petitioner allegedly aided and abetted, is a violation of Section 16(a) of the Securities Exchange Act. Nowhere does Section 16(a) refer to securities *listed* on an exchange; it relates only to securities *registered* on an exchange. The terms *registered* and *listed* are quite different, as is indicated at pages 29-33 of petitioner's brief and pages 18 and 19 of the Government's brief. In disregarding the requirements of the statute, and substituting by rule an entirely different requirement of its own, the Commission has overreached its powers and arrogated to itself the powers of Congress.

By its inaccurate statement of what was charged in Counts 10 through 20, the Government has sought to supply to the charge essential elements which the charge itself lacks. The references referred to, *supra*, describing Comficor as petitioner's "personal holding company" are intended to suggest an obligation and responsibility on the part of petitioner to cause that corporation, of which he was not an officer, a director, or a substantial stockholder, to file reports required of it as a corporation. The indictment itself contained no such allegations or charges.

In the recent case of *Turnipseed* v. *United States*, 272 F. 2d 106 (7th Cir., 1959), it was held that to sustain a conviction as an aider and abettor, it is necessary to prove

that the alleged aider and abettor acted with knowledge that an offense was to be committed. In that case the mere inferences which the Government sought to draw were held to be insufficient. And, in *United States* v. *Williams*, 341 U. S. 58, 64, this Court held that aiding and abetting means to assist the perpetrator of a crime, and that merely being present does not make one an aider and abettor.

The record here shows nothing to indicate that petitioner ever did anything to deter or prevent the filing of reports by Comficor or that he had any responsibility for the filing of such reports. There was here a complete lack of relevant evidence from which the jury could properly find, or infer, beyond a reasonable doubt that petitioner had violated the reporting requirements of the act in connection with form 4 reports allegedly due from Comficor. *Mortensen* v. *United States*, 322 U. S. 369, 374; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 787.

Here positive indication was given to petitioner that Comficor was not a 10% stockholder and so subject to the reporting requirements when he was notified in November 1957 by the New York Stock Exchange that 1,190,036 shares of F. L. Jacobs Co. common stock were authorized to be listed. (Gov. Ex. 490, Gut. App. pp. 127a-134a.)

The representative of the Exchange testified that after such action of the Board of Governors of the Exchange in November 1957 no further authority or action was required with respect to the listing of any of such 1,190,036 shares. Thus, if such 1,190,036 shares comprised the listed shares of F. L. Jacobs Co., it would have been necessary for the Govenrment to establish that Comficor, Inc., was the beneficial owner of 119,003 shares in order to sustain the charges contained in these eleven counts of the indictment.

Of the 1,190,036 shares which were the subject of the Exchange's authorization of November, 1957 (Ex. 490), 151,442 shares were reserved for the exercise of options previously issued by the company (Transcript, p. 1896),

and 165,901 shares were reserved for exercise by preferred stockholders of the company to convert their shares into shares of common stock (Transcript, p. 1899). The remaining 882,607 shares were the shares which were then issued and outstanding as common stock in the hands of common stockholders.

The Government proceeded on the assumption that it had only to establish that in December, 1957, Comficor was the beneficial owner of 88,260 shares—i.e., 10% of the shares then issued and outstanding in the hands of the public. This was 30,743 shares less than the Government would have been required to show under a construction consistent with the language of the Commission's Rule X-3B-1, and urged by the defense.

Exhibit 431, prepared by Greene of the SEC for the Government for the purpose of establishing that the filing of such a report by Comficor for December, 1957, was required, made no reference to shares "registered" or "listed" but referred only to "shares issued and outstanding", disclosing a concept unrelated to the requirements of either the statute or of the rule.

The vice of such charts (Exhibits 431 and 432) lay in Greene's admission that, in preparing them, he had not referred to or taken into account the testimony of Government witnesses on cross-examination, nor defense exhibits, but had referred to and taken into account only the testimony of Government witnesses on direct examination, and Government exhibits. (Transcript, pp. 3008-9, 3013-4.)

Judge MacMahon ruled, in receiving these charts into evidence, that they were being received merely as summaries of the evidence already received. Judge MacMahon held that to examine Greene as to the accuracy of his summaries would "encroach" on the province of the jury. Thus, when defense counsel asked the first question of Greene concerning any consideration by him of cross-examination of Government witnesses, and the witness commenced his answer, Judge MacMahon interrupted and said in the presence of the jury:

"The Court: I am afraid that I must caution the witness not to make such statements, and I am sure it was unintentional. Whether there was anything in the cross-examination of Mr. Carlin which refutes what is shown in these schedules is again the province of the jury, and we must be careful here not to encroach on the jury's province. *But, Mr. Wels, if you want to encroach on it, however, in cross-examination, go ahead.*" (Transcript, p. 2999)

However, these exhibits completely failed to take into account that among the shares attributed to Comficor were 34,000 shares of Jacobs stock purchased by Comficor for the account of petitioner in the months of October and November 1957 and 20,000 shares which petitioner had purchased from Comficor in February and March 1958. Moreover petitioner had reported his beneficial ownership of such shares in Form 4 reports filed by him with the Exchange and the Commission in October and November of 1957, and in March of 1958 (Exhibit X).

Eliminating such 34,000 shares acquired in October and November, the maximum number of shares in which Comficor could have had a beneficial interest in December, 1957, was 95,800 shares,—23,203 shares *less* than the required ten per cent of the listed Jacobs shares.

The testimony that Comficor had included in its purchases shares which it purchased for the account and benefit of petitioner is conclusive. Wick, the Associate Director of Stock List of the Stock Exchange, testified that he had had conversations with petitioner in the spring of 1958 in which petitioner had told him that such purchases had been made for him by Comficor, and that petitioner had reported such purchases to the Exchange and Commission on Form 4 reports (Transcript, pp. 1049, 1095-6; Exhibit EE).

Lipton, the assistant treasurer of F. L. Jacobs Co., who also kept petitioner's personal checkbooks and records, and who placed the orders for many of the Comficor purchases, also testified as to such purchases by Comficor for peti-

tioner's account, and pointed out that, after petitioner's 1956 purchases of Jacobs Stock in 1956, and until his exercise of his stock options in September of 1958, none of the shares acquired by him, and as to which he filed Form 4 reports, were reflected by brokerage accounts or by checks to brokers (Transcript, pp. 1814-16).

Lipton's testimony was supported by the testimony of his assistant, Miss Shaid (Transcript, pp. 3150-51).

Further corroboration of this is found in the testimony of Miss Aiello that, although in this period the cash flow from Comficor to petitioner and Chatham Corporation, was somewhat in excess of $200,000 (Transcript, pp. 2784-5), in the same period petitioner and his personal holding company, Chatham Corporation, paid into Comficor a total of $1,229,500 (Transcript, pp. 2799-2804).

There was likewise testimony showing that Comficor engaged in purchases of Jacobs stock for persons other than petitioner, including Hal Roach and the persons from whom F. L. Jacobs Co. acquired its interest in Symphonic Electronics Corporation (Transcript, pp. 1816, 4170-76). The computation of the Government apparently includes as purchases by Comficor 11,800 shares purchased by Preston Industrial Corporation in which the principals were Pressman and Zisser. It is clear from Exhibits 340 and 341 and the testimony of Zisser (Transcript, pp. 2944-46) that such shares were acquired by Preston Industrial Corporation, and that Comficor's only interest in such shares was a participation in whatever profits would be derived from their liquidation.

Taking into account the 25,000 shares acquired by Comficor for Lippen of Symphonic in May of 1958 (Ex. 431, Transcript, pp. 1816, 4170-76), and the 20,000 shares acquired by Comficor for petitioner in March of 1958 and reported by petitioner on Form 4 that month (Ex. X), it was impossible for Comficor ever to have been a 10% beneficial owner of listed Jacobs stock. It will be recalled that on the back of the Form 4 forms (Exhibit X) the instructions state that "The reporting requirements relate only

to beneficial ownership, direct or indirect. Record ownership does not, of itself, constitute beneficial ownership".

The District Court erroneously charged the jury that, if they found petitioner's contentions with respect to the Comficor transactions to be correct, they might take this into consideration only with respect to two of the eleven Comficor counts—Counts 19 and 20, relating to the months of December 1958 and January 1959. The Court instructed the jury as to this as follows (Transcript, pp. 4918-19):

> "You may consider that contention in determining whether Comficor, Inc., failed to file a Form 4 in the mistaken belief that it was not the beneficial owner of more than 10% of F. L. Jacobs listed stock. In that event, however, Comficor's cumulative position would be less than 10% only in December 1958 and January 1959. If you accept the Government's position that Comficor owned the number of shares stated in the Government's chart, the question of the mistaken belief on the part of Comficor as to the total number of shares listed would apply only to Counts 19 and 20."

Adjustments to the Government's computation in Exhibit 431, only to the extent of reflecting petitioner's acquisition of 34,000 shares through Comficor in October and November 1957, and his subsequent acquisition from Comficor of 20,000 additional shares in March of 1958 (all reported by him on Form 4 reports), results in the following computation, demonstrating that in each of the months in question Comficor's beneficial ownership was less than 10%:

December, 1957	95,800
January, 1958	99,300
February	104,100
March	96,500
April	96,100
May	68,300
June	74,700
July	75,300
November	68,500
December	48,500

The Court also instructed the jury with respect to these counts that "In several Form 4's filed by Guterma, he never once claimed that he acquired Jacobs' shares indirectly from Comficor" (Transcript, pp. 4915-16). Of course, the Form 4 Report itself does not require the making of any statement as to the source of shares acquired, and does not call for any such statement (Ex. X). And the court's error in giving this instruction was further compounded by its instruction to the jury (Transcript, pp. 49-16) that "It is for you to decide on all the evidence in this case whether Comficor, Inc., was a mere holder of record or the beneficial owner of the Jacobs' stock it, purchased, pledged, sold, used and certified under oath as belonging to it." The court, here as on page 4914, lumped all stock purchased by Comficor, Inc., in the same way, without taking into account that different blocks of such shares represented different ownership, were the subjects of different transactions, and that substantial amounts of such shares had been pledged to secure loans to F. L. Jacobs Co., which were personally guaranteed by appellant.

The Government continues to take issue with the correctness of petitioner's understanding that, under the Commission's own rules and definition, "Listed Shares" included those shares reserved for conversion and the exercise of options, and as to which authorization to add to the list had been granted by the Exchange. Yet the comments of the trial judge and of the United States attorney with respect to this are such as to show that, at the very least, the statute and the regulations are so vague as to fail to establish an ascertainable standard of guilt.

Thus, Judge MacMahon at first sustained the position of the defense and said:

> "I hold that additional securities are listed when the notice has been given authorizing the addition of them. In other words, I hold the sentence after the semi-colon

means just what it says; it includes securities for which authority to add to the list on official notice of issuance has been granted." (Transcript, pp. 3718-19)

Thereafter he reversed himself, accepting the Government's contention that such shares did not become listed until issued (Transcript, pp. 3726-37). Later (Transcript, p. 3830) he seemed to revert to his original position.

In his charge to the jury, Judge MacMahon instructed the jury that such shares did not become listed until issued (Transcript, pp. 4917-18), and refused petitioner's request that the jury be instructed that such shares became listed upon the granting of authorization (Transcript, p. 4985). In his charge, Judge MacMahon said:

"In connection with the issue of wilful failure to file, the defense introduced applications to the New York Stock Exchange signed by Guterma and other officers of the Jacobs company for the listing of additional shares of F. L. Jacobs Co. common stock to be held in reserve for conversion of preferred stock and the exercise of stock options. The Stock Exchange granted all of these applications but required official notice of issuance before these reserve shares would be added to the list.

I instruct you as a matter of law that these reserve shares were not 'listed' within the meaning of the regulations. The chart introduced by the Government, therefore, if you believe the witness Wick from the Stock Exchange, accurately reflects the total number of shares listed in the months involved under the column labeled 'Shares outstanding'."

Significantly, such chart (Ex. 431) was one of the few exhibits called for by the jury during its brief period of deliberations (Transcript, p. 4998).

That appellant's contention as to the meaning of listed is correct, rather than the strained interpretation by the

Court, is indicated by the statement of the Assistant United States Attorney on page 3718 of the transcript:

> "In other words, once the Stock Exchange gives notice to the issuer that they have authority to add them to the list, they are included in the definition of 'listed'."

This is precisely what appellant has urged, and what Rule X-3B-1 says. And such notice was given by the Exchange as to all 1,190,036 shares in November of 1957.

Count 5

This is the count which charges petitioner with having wilfully, knowingly, and without just cause, hindered, obstructed, and delayed the filing of the Jacobs annual report for the fiscal year ended July 31, 1958. In its "summary" of the evidence relating to this count in pages 3-16 of its brief, the Government has closely followed the summary of the trial court of which petitioner claims. As in the case of the trial court's summary, an incomplete and highly prejudicial picture emerges.

Thus, at page 13, the Government states: "In May, 1958, the accounting firm of Ernst & Ernst discussed with petitioner and Eveleigh the impending audit of Jacobs for the fiscal year ending July 31, 1958 (Tr. 302, 306-309, 311-313). In a letter to the petitioner and Eveleigh on July 9, 1958, Ernst & Ernst stated that the audit would commence in a short time and that certain reports, supporting data, and audits of subsidiaries by others would be required (Tr. 521-523). Neither petitioner nor Eveleigh replied to the letter."

Like the trial court, the Government omits to refer to the fact that petitioner and Eveleigh as early as May informed Ernst & Ernst that accountants of the subsidiaries had been requested to cooperate fully with Ernst & Ernst, and requested that Ernst & Ernst get in touch with them in preparation for the audit, and that Ernst & Ernst failed

to act on this. Like the trial court, the Government omits to refer to the admissions by partners in Ernst & Ernst that they waited for several months before getting in touch with such accountants. And, like the trial court, the Government omits reference to the admitted resentment of Ernst & Ernst that their firm had not succeeded in taking over the accounts of the subsidiaries from the accountant who had them for years. And the Government also omitted reference to the statement of Ernst & Ernst that they "would not be pushed into hurrying the audit". (Transcript, pp. 347-349, 355-357, 360-365, 386, 389-391, 392-393, 400, 402-405, 412-416, 419-427, 428-434, 449-460, 500-503, 551-558; Ex. A.)

At pages 13-14 of its brief, the Government refers to the inability of Carey of the Ernst & Ernst New York office to contact Eveleigh for a two month period, although significantly no claim is made that Carey sought to contact petitioner. But, like the trial judge, the Government omits to state that no one from Ernst & Ernst had ever written to Eveleigh and advised him that Carey was being assigned to the Jacobs account. And, like the trial judge, the Government fails to refer to Carey's own testimony that, although he was within a few blocks of the Jacobs office several times a week during the period that he was endeavoring to contact Eveleigh, he never took the trouble to call, introduce or identify himself. And, in these references to Carey, the Government, like the trial court, omitted to state that petitioner took Carey before the Jacobs board of directors, and, after introducing him, asked him to tell the board what he still required to complete the audit, and asked everyone to cooperate with Carey in getting this (Transcript, p. 941). Indeed, every partner and employee of Ernst & Ernst who was called by the Government testified that petitioner responded affirmatively to all requests for assistance made to him.

The Government at pages 14-17 of its brief states: "By February, 1959, Ernst & Ernst had prepared an analysis

of Comficor's account, and gave petitioner two confirmation letters showing that Comficor owed Jacobs over $1,717,000 as of July 31, 1958". But the Government, like the trial court, omitted reference to Carey's own testimony that this could not have occurred because of Carey's own absence from New York in this period (Transcript, pp. 918-924, 929, 953-955, 954-956, 963-964, 964-976). The record is clear that this did not happen and could not have happened, since during this period petitioner was out of the country and Carey was in Atlanta in connection with the audit of another company.

Nor does the Government refer to the fact that, in connection with the "later meetings" referred to on page 15 of its brief, petitioner had ceased to be an officer or director of Jacobs prior to their occurrence.

In connection with the references to the account between Comficor and Jacobs, the Government, like the trial court, omits to refer to the fact that the larger balance allegedly due Jacobs was erroneous because funds which had been received by Jacobs from other companies for Comficor's account had not been credited to Comficor on the books because they had not been made directly (Transcript, pp. 1920-1922). And, although the Government, at page 8 of its brief refers as did the trial court to a flow of $2,114,000 from Jacobs to Comficor, it omits to refer, again like the trial court, to a flow of $1,382,000 flowing directly back from Comficor to Jacobs in the same period (Transcript, p. 1805), and to additional payments from other companies for Comficor's account (Transcript, pp. 1920-1922).

In footnote 7, at page 15 of the Government's brief, reference is made to conversations which petitioner had with Haas of Ernst & Ernst after he ceased to be an officer or director of Jacobs as to the location of the stock certificates for 40,000 Scranton shares owned by Jacobs. But the Government, like the trial court, omitted to state that an Ernst & Ernst partner testified that he had been told

by the Jacobs officers that such shares had been pledged, and with whom; that Ernst & Ernst then sent out letters of confirmation to such pledgees, and received back confirmations relating to 37,000 of the 40,000 shares in question, and never bothered to get in touch again with those who had failed to respond to the confirmation letters (Transcript, pp. 851-857, 860-862).

References are made at page 9 and elsewhere of the Government's brief to pledges of the Jacobs stock owned by petitioner, Eveleigh, and Comfi'or, and of Scranton shares owned by Jacobs "as collateral on loans made to petitioner, Eveleigh, Comfi'or, and Chatham". But the Government, again following the lead of the trial judge, omits to state that many of such loans were loans made to F. L. Jacobs Co., personally guaranteed by petitioner, and secured by Jacobs stock belonging to petitioner, Eveleigh, Comfi'or, and Chatham.

Non-Compliance With the Order of Discovery and Inspection

The discussion, at pages 22-24 of the Government's brief, of the Government's failure to comply with the order of discovery, reflects a confusion and lack of understanding as to what in fact occurred at the trial.

The references at page 33 to statements on pages 31 to 34 of the trial transcript obviously could have no relationship to documents offered subsequent thereto by the Government, and which had never before been seen by defense counsel. The records as to which the defense at that point had requested access were the defendant's own papers, impounded by the Government, and which the Court of Appeals in *United States* v. *Caterma*, 272 F. 2d 34, had directed should be released to the petitioner only a few days before the commencement of the trial. The Court of Appeals had referred this matter to Judge

Dimock for implementation of its decision, and Judge MacMahon had on December 2, 1959, denied a continuance for the purpose of permitting petitioner to study and review such voluminous records, and had ordered the trial to commence on December 7. At the time of such denial by Judge MacMahon, Judge Dimock had not yet held his hearing on the implementation of the decision of the Court of Appeals.

At page 23, of its brief, the Government says that "petitioner fails to point to any specific instance where the Government allegedly disobeyed the order of discovery." Instances of such non-compliance are reflected at, for example, Transcript, pp. 1521, 2109, 2238-224?a, 2519-2522, 2288-2291, 2956.

The prejudice sustained by petitioner by reason of this is indicated by the nature of such exhibits themselves. Thus, at pages 2888-91, the exhibits objected to were Exhibits 397, 398 and 407, the check books and minute book of Classic Carpet Corporation. The Government and its witness Locke conceded that these records had been in the Government's possession for months prior to Judge Noonan's decision. The Classic Carpet transactions assumed a major role in the Government's case, although there had been no reference to them in the indictment or anywhere else until such exhibits were offered at the trial.

The prejudice resulting from the surprise injection of these matters into the case becomes evident by reading the Government's emphasis upon these documents in its summation (Transcript, pp. 4714-22, 4772, 4811-24), and the description of this transaction as "Guterma's supreme jest" (Transcript, pp. 4811-4824).

Nor did the Government in complying with Judge Noonan's discovery order give any indication that the transaction which it claimed to be the subject of Count 9 was the transaction with Inland Credit Corporation in January 1959 whereby Jacobs' interests in Grand Rapids

Metalcraft Corporation were deposited as collateral for a $150,000 loan; which it had been specifically directed to produce. Yet, during the testimony of Lesser of Inland Credit, documents were offered by the Government relating to these claimed diversions and hypothecations which had not previously been available to appellant though in the Government's possession, and which were admitted over objection, which defense counsel permitted but a brief recess to examine them (Transcript, pp. 2519-22).

The Government has suggested that its failure to obey Judge Noonan's discovery order was cured by the Court permitting defense counsel to examine offered documents in a short recess of fifteen or twenty minutes, or by taking a luncheon recess "somewhat longer than usual". Such an examination of specific documents, without the opportunity for intensive pre-trial investigation into the circumstances of the transactions to which such documents related, was of little assistance to the defendants and certainly failed to accomplish the purpose of discovery—to permit defendants to come to trial prepared to meet the issues of fact as well as law there to be raised.

Certainly the matters as to which the trial court here charged the jury at pages 4964-66, 4962, and 4898 of the record, and which played the dominant role in petitioner's conviction, were not disclosed to be in issue by the indictment. The indictment gave the defendants no indication that they were to be prepared to meet such issues. Nor did they receive any further indication by the denial of the motions for bills of particulars. Had the Government complied with Judge Noonan's order of discovery, petitioner would have been on notice as to such issues and could have prepared his defenses as to them.

Conviction by Charts

At pages 24-25 of the Government's brief, there is discussion of Exhibit 21, a financial statement of F. L. Jacobs

Co. for the year ended July 31, 1958, which the accountants who prepared it refused to certify because they could not substantiate its contents, and which reflected speculation, opinion and guesswork. In footnote 14, on page 24, the Government incorrectly comments that none of the defendants moved to strike this exhibit. Defense counsel did in fact unsuccessfully move to strike such exhibit (Transcript, p. 864). But, even if they had not, on appeal an error such as this which seriously affects the fairness, integrity and public reputation of judicial proceedings could be corrected. *United States* v. *O'Connor*, 237 F. 2d 466 (2nd Cir. 1956).

Exhibit 21 was in large part based upon hundreds of entries made on the books of F. L. Jacobs Co. by one Locke, many months after petitioner had left Jacobs, and which Locke himself testified were not supported by documentation. The supposed "decrease" of $3,750,000 in the equity of Jacobs shareholders of which so much has been made resulted from arbitrary writedowns by Locke to $1 of substantial assets of Jacobs—and time and again Locke admitted that such writedowns had been made by him arbitrarily and without substantiation. The Government justifies the receipt in evidence of such entries on the ground that they were "items recorded in the formal books of account of Jacobs" (Govt. brief, p. 104), but, of course, it does not say on what such entries were based, or that they were made long after appellants had left Jacobs, and so could not be binding upon them. The Government likewise says that such entries "related to events prior to July 31, 1958" but it omits to disclose that none of such entries were made until the spring of 1959, that many of them were made long thereafter, and that they represented unsubstantiated revisions of prior entries made concerning the same transactions.

All of the charts prepared by Locke and Doyle which were received into evidence and taken by the jury into

the jury room (Exhibits 471 through 476, and Exhibits 493, 494 and 495) these exhibits were based on Exhibit 21, and each so states in the annotations attached to each of them.

Such charts included Exhibit 475, which is entitled "Pledges of 38,198 Shares of Scranton Corp. Stock Acquired by F. L. Jacobs Co." The first pledges referred to on such chart "reflect" the pledge of 5,000 such shares on February 3 and February 5, 1958, by Comficor, Inc. with Reldan Trading Corp. The plain import of such reference is that Comficor on those dates pledged for its own benefit 5,000 shares of Scranton stock owned by Jacobs. But this is completely false.

The record shows that while such shares were still owned by the Zweifach group, the Zweifach group had itself pledged such shares with Reldan (Transcript, p. 2277). The record also showed that such shares were purchased from the Zweifach group, *not by Jacobs*, but by Comficor, under an arrangement whereby Comficor assumed the existing indebtedness due from the Zweifach group to Reldan on such shares. As Cohen of Reldan put it, "The proceeds of the Comficor loan paid off the Zweifach loan" (Transcript, p. 2277). And Zweifach himself testified that the purchase of such shares was made by Comficor rather than by Jacobs because the board of directors of Jacobs had not yet approved the acquisition of Scranton (Transcript, pp. 1306-7, Exhibits JJ and KK). So Comficor was not then pledging shares of Scranton owned by Jacobs, but its own shares. Yet this is not reflected in Exhibit 475, nor are any references made to this testimony in the annotations because Locke, like Greene, in preparing his charts only consulted the direct testimony of Government witnesses and Government exhibits, and ignored all testimony on cross examination as well as defense exhibits.

Again, on Exhibit 473 (entitled "Pledges of 18,461 Shares of Scranton Corp. Stock Acquired by F. L. Jacobs

Co.) the import of this exhibit is that assets owned by F. L. Jacobs Co. were pledged for some improper purpose. The plain fact and testimony, however, is that the loan made in connection with such shares by Reldan was made simultaneously with the acquisition of such shares, and was part of the financing by which such shares were acquired by Jacobs from the Silett Group (Transcript, pp. 2276, 2654-2670, Exhibits 287, and 365 through 376). Reldan's check for the proceeds of this loan went directly to Jacobs' bank for deposit in Jacobs' account (Transcript, p. 2276).

Again, Exhibit 475 in column 9 "reflects" the pledge of 14,004 shares of Scranton stock with The Silver Company by Comficor. Doyle himself admitted that this was an error, and that this transaction involved 4,000 shares less than the exhibit stated (Transcript, pp. 3901-7).

In Exhibit 474 (entitled Pledges of 40,000 Shares of Scranton Corp. Stock Acquired by F. L. Jacobs Co.) the import of this caption, like the captions of the other charts, is that all of the shares referred to had been acquired by and belonged to F. L. Jacobs Co. Exhibit 474 reflects the pledge of F. L. Jacobs Co. 10,000 such shares with Alben Affiliates. Doyle himself admitted that these 10,000 shares belonged not to F. L. Jacobs Co., but to Hal Roach, Jr. (Transcript, pp. 3816-64). And Doyle likewise testified that other shares of Scanton stock belonging to Roach and others which had been pledged by Jacobs for loans made to Jacobs were not in any way reflected in these charts.

This, of course, is an essential factor in any honest understanding of the situations relating to pledges of Scranton shares. The testimony is clear that the shares of Scranton stock acquired by Jacobs were held by it in street name for purposes of facilitating the financing of the acquisition of such shares, and other loans. The testimony is likewise clear that such shares were commingled at the

Jacobs offices with 35,000 Scranton shares owned by Roach, and 5,000 Scranton shares owned by petitioner (and it should be noted that the number of shares which the Doyle charts claim were pledged by petitioner were 4,018, less than the number owned by him). And it is apparent from the testimony of Doyle, as well as from the testimony of the moneylenders, that the Scranton shares owned by Roach and Guterma were pledged as collateral for loans made by Jacobs, just as particular certificates owned by Jacobs were pledged for loans made to Comficor.

Stock certificates are fungible, and it is permissible for them to be replaced by others of equal quantities, qualities and use. *Smolowe v. Delendo Corporation*, 136 F. 2d 231 (2d Cir., 1943, cert. den. 320 U. S. 751); *Walet v. Jefferson Lake Sulphur Co.*, 202 F. 2d 433 (5th Cir., 1953), cert. den. 346 U. S. 820; *Gratz v. Claughton*, 187 F. 2d 46 (2d Cir., 1951), cert. den. 341 U. S. 920 (Transcript, pp. 4463-4466, 4872).

The impropriety of the use of such "evidence" to produce a conviction was recently noted in *Greenberg v. United States*, 280 F. 2d 472, 476-477 (1st Cir., 1960), where it was held to be improper to use the testimony of an "expert" like Locke.

The sum and substance of the statements made by the Government as to the supposed looting of F. L. Jacobs Co. are derived from the guesses of Locke as reflected in his "green ink" and "black ink" entries, and from Exhibit 21 based thereon, and the charts which purported to present a fantasy on the basis of Exhibit 21, and the testimony of Locke. What could be more misleading, prejudicial and inflammatory than the statement on Exhibit 476 that Comficor had obtained loans amounting to $1,065,000 on Scranton shares "acquired by F. L. Jacobs Co."? The plain fact, as adduced by the exhibits introduced by the Government through the moneylenders and by the moneylenders' own testimony, is that almost all of such loans

were made primarily upon shares of stock of F. L. Jacobs Co. and The Bon Ami Company owned by Comficor, and that Scranton shares were but a small factor in connection with these loans.

And, with its constant references to an identity between Comficor and appellant Guterma, the Government is in effect telling the jury through this chart that more than a million dollars went into "Guterma's pockets" through the medium of these loans. There is nothing to establish this. To the contrary, the record affirmatively shows that during the entire period the net cash flow between Comficor and Guterma was a net flow *from Guterma to Comficor* in excess of one million dollars (Transcript, pp. 2784-5, 2799-2804).

At pages 26 through 29 of the Government brief, an effort is made to justify the inclusion in the conspiracy count of the indictment of paragraph 7 which charged that it was a part of the conspiracy for petitioner and others to appropriate to themselves assets of F. L. Jacobs Co. — concededly, something in itself not a violation of Federal law.

The Government now claims that this was permissible, along with proofs of looting and embezzlement introduced under such paragraph of the conspiracy count, as establishing petitioner's motives for failing to file the required reports. That this was *not* the theory on which such evidence was received was made clear by the trial court when it refused the Government's request for an instruction that the jury might consider such evidence as proof of motive (Transcript, p. 4987).

Even if relevant to motive and intent, the proof must be limited, and not permitted to become so disproportionate to proof of the crime charged that it overwhelms proof of the crime charged and causes it be become so subordinated that it escapes consideration by the jury, resulting in a conviction for motive only.

The Government now also claims that proofs as to such matters were relevant and admissible on the issues of intent and motive, citing *United States* v. *Feldman*, 136 F. 2d 294 (2d Cir., 1943); *United States* v. *Puff*, 211 F. 2d 171 (2d Cir., 1954); and *United States* v. *Crowe*, 188 F. 2d 209 (7th Cir., 1951).

But those cases all stand for the proposition that *when a defendant takes the stand* he may be cross-examined as to such matters, even though they have not resulted in conviction—a proposition and rule which even the second circuit now appears to have abandoned since its decision in *United States* v. *Tomaiolo*, 249 F. 2d 683 (2d Cir., 1957).

What happened at the trial here was similar to that in *United States v. Feldman, supra*, where Judge Clark, in his dissenting opinion, recorded his disturbance at his feeling that the defendant "was tried and convicted of general amoral conduct rather than of specific intent to defraud by mail".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York, N. Y., October 21, 1960.